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In The

# Supreme Court of the United States

RONALD SAPP and FLETCHER SAPP,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the court of appeals, in denying petitioners' claims of ineffectiveness of counsel that occurred at their trial for bank fraud because of an insufficient showing of prejudice, erroneously failed to take into account that materiality is an element of that offense where petitioners' defense at trial was that there was no fraudulent intent or actual financial harm inflicted upon the victim/bank.

2. Must a defendant in a bank fraud prosecution who has established that trial counsel had an actual conflict of interest that adversely affected his performance, involving counsel's law firm's prior and ongoing representation of the victim/bank and one of its officers, meet the *Strickland* prejudice test to receive a new trial.

3. Does trial counsel's failure to call as witnesses the attorneys and an accountant that negotiated the loan transaction under which petitioners' were later convicted of bank fraud under 18 U.S.C. § 1344, who would have testified that petitioners did not act with an intent to defraud and that the fraudulent act involved was not material because petitioners were legally entitled to the funds they received from the victim/bank, establish sufficient prejudice to be entitled to a new trial under *Strickland v. Washington*.

4. Whether petitioners in this 28 U.S.C. § 2255 case have made a sufficient threshold showing "good cause" to be entitled to discovery under *Bracy v. Gramley*, 520 U.S. 899 (1997).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Ronald and Fletcher Sapp pray that a writ of certiorari issue to review the judgment of the court of appeals below, which rejected their constitutional challenges in this § 2255 case to their bank fraud convictions under 18 U.S.C. § 1344.

## OPINIONS BELOW

The December 18, 1998 opinion of the Tenth Circuit Court of Appeals is unpublished and is published in the Appendix at A-1. The December 8, 1997 opinion of the United States District Court for the District of Kansas is published at 989 F.Supp. 1093 (D. Kan. 1997) and is published in the Appendix at A-15. The January 20, 1999 order of the Tenth Circuit Court of Appeals denying petitioners' petition for rehearing and suggestion for rehearing *en banc* is unpublished and is published in the Appendix at A-37.

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Tenth Circuit issued its opinion on December 18, 1998. Petitioners' petition for rehearing and suggestion for rehearing *en banc* was denied on January 20, 1998. Under 28 U.S.C. § 2101(c) and Rule 13.1, the present petition for writ of certiorari was required to be filed by petitioners within ninety days. On application of petitioners, Circuit Justice Breyer granted petitioners a sixty-day extension of time up to and including June 19, 1999 to file their petition. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

This case also involves 28 U.S.C. § 2255, which provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

This case also involves Rule 6(a) of the rules governing § 2255 proceedings, which provides:

> A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).

## STATEMENT OF THE CASE

Petitioners challenge their conviction for attempting to defraud a federally insured bank, in violation of 18 U.S.C. § 1344(2). This case, brought in the district court under 28 U.S.C. § 2255 and Federal Rule of Criminal Procedure 33, involves the right to effective assistance of conflict-free counsel, and the standard of prejudice to be applied where trial counsel, who had an undisclosed attorney-client relationship with the victim of the alleged offense, failed to present evidence that the defendants did not act with fraudulent intent or misrepresent any matter material to a transaction with a federally insured bank.

### I. PROCEDURAL HISTORY.

Petitioners Ron and Fletcher Sapp were indicted in Case No. 93-20064-01/02-DES with one count each of giving false information to a federally insured bank, and jointly with one count of bank fraud, in violation of 18 U.S.C. § 1344(2), based upon a series of transactions with First State Bank ("First State") and Midland Bank of Kansas ("Midland"). Under Counts I and II, petitioners were accused of giving false financial statements to First State; Count III alleged that petitioners attempted to defraud Midland. On December 3, 1993, a jury acquitted petitioners of Counts I and II, and found them guilty under Count III. On March 9, 1994, the Honorable Dale E.

Saffels sentenced each defendant to 21 months confinement, 5 years supervised release, and ordered them to pay restitution of $279,000.00 to First State. The Court of Appeals affirmed the conviction. *United States v. Sapp*, 53 F.3d 1100 (10th Cir. 1995); *cert. denied*, 516 U.S. 1082 (1996).

Petitioners on April 23, 1997 filed a motion under 28 U.S.C. § 2255 to set aside their convictions and sentences, alleging, among other things, that trial counsel was ineffective for failing to disclose their attorney-client relationship with Midland, the victim of the alleged offense, and for failing to call witnesses, including the attorneys who negotiated the transaction, to testify that petitioners acted within the terms of their agreements with Midland, and that their alleged fraud was immaterial to the transaction. Petitioners also alleged that the government withheld exculpatory evidence and knowingly presented misleading testimony.

Petitioners also filed on June 12, 1997 a motion pursuant to Federal Rule of Criminal Procedure 33, requesting a new trial based upon newly discovered evidence, which included the affidavit of the government's key witness, Midland President Bruce Rhoades, admitting that he lacked personal knowledge to support his trial testimony against the Sapps because he did not negotiate the settlement agreement between Midland and the Sapp brothers, and interrogatories by David Herndon, President of First State, essentially admitting that the Sapp brothers did not mislead First State on any material matter. Petitioners moved that the cases be consolidated, and requested reasonable discovery and an evidentiary hearing with respect to both motions.

The district court granted petitioners' motion to consolidate and denied the Rule 33 and § 2255 motions, without permitting discovery or conducting a hearing, on December 8, 1997. The Court of Appeals granted petitioners' application for certificate of appealability on all claims, and on December 18, 1998, filed its opinion affirming the judgment of the district court. Petitioners filed a timely motion for rehearing or rehearing en banc, which was denied on January 20, 1999. Circuit Justice Breyer granted petitioners a sixty-day extension of time up to and including June 19, 1999 to file this petition for a writ of certiorari.

## II. SUMMARY OF BUSINESS TRANSACTIONS UNDERLYING CONVICTIONS.

Ron and Fletcher Sapp are brothers engaged in several joint real estate and other investment ventures. They did substantial business at Midland and First State; as of December, 1990, the Sapps had a total of $1,498,967.67 in outstanding loans with First State.

The Sapp brothers experienced financial problems as a result of unlawful banking practices of Lee Greif, chairman and majority shareholder of Midland. To shore up his financially troubled bank, on at least three separate occasions Greif conditioned the Sapps' legitimate loans on their purchase of properties on which Midland had bad loans. Greif provided the Sapp brothers misleading information about the condition and profitability of the properties. As a result, petitioners incurred substantial expenses to service the debt and repair those buildings. (A-38).

Greif's practices put the Sapp brothers in financial distress. Petitioners sold some of their businesses at a

loss; they also lost significant sums of money on the real estate transactions financed by the Midland loans. They were in danger of defaulting on debts at Midland, First State and with other creditors. They began negotiations with Midland and First State to resolve their financial difficulties. In late 1990, petitioners hired attorney James Wirken to represent them in their negotiations with Midland. (A-39).

Wirken advised Greif of the Sapps' intent to sue him and Midland for unlawful banking practices, in violation of the Bank Anti-Tying Act, 12 U.S.C. § 1972. Wirken believed that Midland and Greif had significant liability exposure for the damages they had caused the Sapps. If successful, the Sapps' claims against Midland would have resulted in a judgment for actual damages, certain incidental damages, plus attorneys' fees. (A-39).

Greif retained attorney Chris Henry to represent him and Midland. Through counsel, a settlement was negotiated which resulted in restructuring petitioners' debt. The Midland Agreement, signed February 7, 1991, provided a line of credit of $850,000 to the Sapp brothers to compensate them for their damages and to work out their indebtedness to other creditors, including First State. The agreement provided that "the surplus shall be disbursed to the borrowers." Mr. Wirken confirmed that the surplus provision was of vital importance to the Sapp brothers, and that they would not have released their valid lender liability claims against Midland without it. (A-40). Under the agreement, petitioners and their wives released their

claims against Midland and its officers, shareholders and directors.[1]

While negotiations were under way with Midland the Sapp brothers were negotiating with David Herndon, President of First State, to reduce their debt by surrendering collateral, making lump-sum payments, and discounting loans. On January 22, 1991, Herndon wrote the Sapp brothers a letter in which he tentatively offered a $279,000 discount in exchange for the early payment of several notes, continuation of existing notes, and a mutual release of claims. This letter preceded the Sapps' agreement with Midland.[2] (A-16-17).

On February 28, 1991, the Sapp brothers and First State executed an agreement which called for the Sapps to pay $836,061.42 in cash, surrender certain cash collateral, and continue payment of other existing notes at First State. It was understood that the Sapps would obtain the cash needed to fund the agreement from several sources, including the liquidation of cash accounts, the sale of a business known as Palace Amusement, and funds borrowed from Midland. Herndon believed that the Sapps were going to borrow $280,000 from Midland to fund the

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[1] The district court stated that "[a]fter the defendants defaulted on some loans at First State Bank, they began negotiating for additional funds from Midland Bank to pay off some of their debts at First State." (A-15-16). The evidence tendered by petitioners in support of their 2255 motion indicates that is not an accurate portrayal of the negotiations.

[2] The court below stated that "First State agreed to discount some of the defendants' outstanding loans by $279,000, leaving them $280,000 in debt on the discounted loans, which First State thought would be paid by funds the Sapps were going to obtain from Midland." (A-16). The Sapp brothers' actually owed First State $1,631,841.49.

agreement; however, paragraph 6 of the Agreement did not specify a source of funds, and Midland was not mentioned in the Agreement. Herndon placed a March 1, 1991, deadline for the Sapp brothers to consummate the agreement.

On February 27, 1991, the Sapp brothers sent a letter to Midland requesting a wire transfer of $405,000 of their $850,000 settlement agreement to First State, and in addition to their own names, signed Herndon's name to the letter without his knowledge or consent. Midland failed to make the transfer, and the agreement was not consummated by March 1.[3] (A-16). On March 15, 1991, Wirken called Herndon and his attorney, John Peterson, and advised them that the Sapps had signed Herndon's name to the February 27 letter. Herndon and Peterson indicated that "the letter was immaterial to them and that they only wanted their money." (A-41). This was confirmed by them in writing on March 18, 1991, and on March 22, 1991, they voluntarily completed the workout agreement, even though Herndon's March 1, 1991, deadline had passed. (Id.). On that date, First State received $280,000 from Midland and $91,500 from Country Hill Bank, another Greif-controlled institution. The balance was paid with the Sapps' personal funds. Thereafter, as

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[3] The district court stated that "[b]efore disbursing the loan monies, however, Midland discovered the discrepancy between the amount requested in the letter and the amount First State Bank expected the Sapps to request to pay off the discounted loans." (A-16). This is unsupported by the record; both Rhoades and Herndon testified that the anticipated March 1, 1997 closing was delayed for unknown reasons. Furthermore, Rhoades testified that the amount of money required to bring the Sapps current on their obligations at First State was immaterial to Midland.

agreed, Midland distributed the balance of the $850,000 settlement funds to the Sapp brothers for their personal use. (A-43). At no time did Midland require any releases for disbursal of funds.

After the Sapps paid First State Bank all of the funds of the workout agreement, Herndon filed with the FDIC a report of apparent crime, stating that the Sapps had forged his signature on a February 27 letter which "indicated First State Bank's payoff to be $405,000 vs. the $280,000 agreed by First State Bank." In reality, First State's "payoff" under the Agreement exceeded $800,000.

On September 4, 1992, Greif, because of misconduct similar to that committed against petitioners, was banned from banking by the Federal Reserve. He was removed as an officer or director of Midland or associated banks, and ordered to pay $2,735,857.38 in restitution to Midland Banks. On July 8, 1996, Greif was sentenced to two years in federal prison pursuant to a plea agreement that allowed him to avoid trial on a twenty-five count indictment for bank fraud, money laundering loan kick-back schemes totaling $4.4 million. Bruce Rhoades, President of Midland and a crucial government witness against petitioners, was also investigated by the FDIC for unlawful banking practices, and eventually consented to be banned from banking, though he avoided criminal prosecution. (A-26). In April, 1993, the FDIC closed Midland and seized its assets.

## III. TRIAL PROCEEDINGS.

In August of 1993 petitioners were indicted on three counts, alleging that they submitted false financial statements to a federally insured financial institution in violation of 18 U.S.C. § 1014 under Counts I and II, and

charging them with attempting to defraud Midland under Count III. The jury convicted them only on Count three, which alleged in relevant part that:

> 18. On or about February 11, 1991, defendants and First State Bank agreed that the defendants would obtain a $200,000 loan from Midland Bank, which would be used to pay off and/or reduce some outstanding loans at First State Bank. On or about February 28, 1991, the parties agreed that the loan obtained from Midland Bank would be in the amount of $280,000.
>
> 19. On or about February 27, 1991, the defendants Fletcher Sapp and Ronald Sapp presented to Midland Bank what appeared to be a letter agreement, signed by themselves and the President of First State Bank, David L. Herndon. The February 27, 1991, letter proposed a loan of $405,014.88 from the Midland Bank. In truth and in fact, as the defendants Fletcher Sapp and Ronald Sapp well knew, David Herndon did not sign the February 27, 1991, letter, as his signature was forged.
>
> 20. On or about February 27, 1991, . . . the defendants Fletcher Sapp and Ronald Sapp knowingly and unlawfully executed and attempted to execute a scheme and artifice to obtain, by means of false and fraudulent pretenses, representations and promises, the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of Midland Bank, . . . in that defendants, to obtain a distribution of $405,014.88, submitted to Midland Bank a February 27, 1991, letter with the forged signature of First State Bank's President, David L. Herndon.

Indictment, pp. 4-5.

Petitioners hired David Everson of the law firm of Stinson, Mag and Fizzell to represent them on the criminal charges. Although they had initially sought representation by James Wirken, he declined because he believed that he would be a material witness in the case. (A-44). Everson told petitioners that one of his partners, Michael Lochmann, had been consulted by Greif's attorneys, Wyrsch, Marakian, Lee and Hobbs, on banking law matters relating to Lee Greif, but Greif had consented to the firm's representation of the Sapps.[4]

At trial, the government's key witnesses were Bruce Rhoades, former President of Midland, and David Herndon, President of First State. No other witness with personal knowledge of the negotiations testified, even though the attorneys who negotiated and drafted the agreements were available. (A-38, 51, 54). Rhoades testified, admittedly falsely, that he had personally negotiated the February 7, 1991 Loan Agreement with petitioners, that Midland did not intend for petitioners to receive any money personally from the $850,000 line of credit established under the agreement, and that the exclusive purpose of the $850,000 was to satisfy petitioners' debt at First State.[5] Trial counsel extracted contradictory admissions from Rhoades on cross-examination, but introduced no evidence to contradict Rhoades' assertions.

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[4] Petitioners learned after their trial that Greif conditioned his consent on the firm's continued observance of his attorney/client privilege, and the firm's promise not to use confidential information to help the Sapps. (A-57-58).

[5] Bruce Rhoades now acknowledges his testimony was false and he did not negotiate the settlement agreement and the $850,000 was never just for First State Bank. (A-49).

Herndon testified that the February 27, 1991, letter inaccurately stated the agreement between the Sapps and First State because the requested amount – $405,000 – was inflated. The government also suggested through Herndon's testimony that the Sapps had unlawfully negotiated the loan discount:

> Dave Herndon testified without qualification that the defendants deceived him; that had he known the defendants had access to $850,000, he would not have forgiven $279,000 of loans; that he wanted the money back . . . [T]he government purposefully sought evidence in the form of Dave Herndon's testimony on this very issue for this very purpose of loss calculation.

(Presentence Report, p. 38). However, trial counsel did not present the testimony of attorney James Wirken that even after discovering the forged letter, First State completed the workout agreement on identical terms because, in the words of First State President Herndon and his lawyer, Pete Peterson, "the letter was immaterial and they only wanted their money." (A-41).

Trial counsel did not call Christopher Henry, James Wirken or Brian McCallister, to rebut the government's claims regarding the scope and intent of the agreement. At the close of the evidence, the jury acquitted petitioners under Counts I and II, and convicted petitioners under Count III of attempting to fraudulently obtain money from Midland. Each was sentenced to 21 months imprisonment, 5 years supervised release, and ordered to pay $279,000 in restitution. That judgment was affirmed in *United States v. Sapp*, 53 F.3d 1100 (10th Cir. 1995); *cert. denied*, 516 U.S. 1082 (1996).

## IV. PROCEEDINGS PURSUANT TO 28 U.S.C. SEC. 2255 AND RULE 33.

After their release from prison, petitioners brought a law suit against Lee Greif for his fraudulent actions in the transaction that led to their conviction, and won a judgment for $914,564.14. (A-59-60). Through discovery in that litigation, petitioners obtained additional information which they presented to the district court in support of their motion for relief from judgment under § 2255 and their motion for new trial under Rule 33. Petitioners presented several grounds for relief, including a claim that trial counsel was ineffective for failing to call the principles who negotiated the transactions in question, and because trial counsel had an undisclosed attorney-client relationship with Midland, the victim of the alleged offense. Petitioner also alleged that the government presented false and misleading testimony, and that the government failed to disclose Rhoades' pending FDIC investigation.

The district court on December 8, 1997, denied petitioners' motion for discovery, motion for evidentiary hearing, their motion for relief under § 2255, and their motion for new trial under Rule 33. (A-15). The Court of Appeals granted a certificate of appealability on all issues, and on December 18, 1999, filed its opinion affirming the judgment of the district court. (A-1). Without discussing the materiality element of the charge, and ignoring extensive evidence showing that the forged letter was immaterial to the transaction with either First State or Midland, including admissions of First State President David Herndon that the letter was "immaterial," the Court of Appeals affirmed the district court finding that petitioners "have not shown how this would be a plausible alternative defense strategy." (A-10). The

Court of Appeals denied rehearing on January 20, 1999. This petition for a writ of certiorari is now before this Court for discretionary review.

## REASONS FOR GRANTING THE WRIT

### I.

### CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' RESOLUTION OF PETITIONERS' INEFFECTIVE ASSISTANCE TRIAL COUNSEL CLAIMS CONFLICTS WITH THIS COURT'S RECENT DECISION IN *NEDER V. UNITED STATES*.

Petitioners have never disputed either at trial or in this collateral attack to their bank fraud conviction, that they signed the name of First State Bank President David Herndon, without his knowledge or consent, on a letter requesting that Midland Bank disburse $405,000 to First State. However, both the defense at trial and the omitted evidence that forms the basis of the ineffectiveness of counsel claim before the court in this § 2255 case establishes that the misrepresentation involved was not effected with a fraudulent intent and was immaterial to the transaction because petitioners were entitled to the money that they received from Midland Bank and neither Midland nor First State Bank suffered nor were they at risk of suffering any financial loss as a result of petitioners' action. Petitioners argued in their opening brief below that "if defendant never intended to provide false information *or if misrepresentations were immaterial*, defendant has a valid defense." Appellant's Brief, p. 17, citing *United States v. Gaudin*, 515 U.S. 506 (1995) and *United States v. Hollis*, 971 F.2d 1441, 1443 (10th Cir. 1992). Nevertheless, neither court below even addressed the element of materiality.

Attorney James Wirken and other witnesses who were involved in the underlying loan transaction could have all testified at trial that the forged letter at issue was immaterial because it was well within the terms of the previously executed agreement. Mr. Wirken's affidavit states that "[T]he substance of the letter is well within the terms of the Sapp's agreement and is not misleading, deceitful or materially false with respect to either bank . . . The amount of money was correct, the money was eventually paid by Midland to First State Bank to apply to the Sapp's indebtedness. In fact, both banks benefitted from the deal. I do not believe anyone relied on any false signature." (A-45). Mr. Wirken would have testified that under the agreement, the Sapps had an enforceable legal right to insist on Midland's disbursal of $405,014.88 to First State:

> [T]he Sapps were entitled to at least $850,000.00 from Midland Bank of Kansas, and therefore were clearly entitled to $405,000.00, which in fact was subsequently paid to First State Bank in the global closing on all related transactions. If Midland Bank had refused to disburse the money as requested by the Sapps, Ron and Fletcher Sapp would have a legitimate cause of action against Midland Bank of Kansas for breach of the February 7, 1991 Agreement.

(A-42-43). Persuasive evidence that the materiality element is indeed in issue in this case is the fact that after the allegedly fraudulent letter was discovered and known by all parties, the transaction was nevertheless carried out. (A-42).

The materiality issue is also squarely addressed by the affidavit of Chris Henry, legal counsel for Midland Bank, who establishes that petitioners had the absolute right under their agreement with Midland to make personal use of the funds available through their agreement.

Henry agrees with Wirken that the requested distribution over Herndon's forged signature was immaterial because the Sapp brothers controlled the disbursement of the funds, and were entitled to the personal use thereof:

> MBOK was not a party to or participant in Sapp's negotiations with their many creditors. Under the terms of the February 7, 1991 loan agreement, once MBOK fulfilled all of the Sapp's requests for payments, the balance, if any, of the $850,000 dollars was to be disbursed to the Sapps *to use at their discretion.*

(A-55). Thus, there is substantial credible evidence that trial counsel could have presented in support of the defense that petitioner's unauthorized use of Herndon's signature on the disbursement letter was not material.

In analyzing the ineffectiveness claim involving the trial counsel's failure to call Wirken and other witnesses to establish that the misrepresentation by petitioners was immaterial, both respondents and the courts below appear to suggest that petitioners' fraudulent conduct alone was sufficient to sustain their conviction. (Resp. 10th Cir. br. at 10-11). As such, the courts below accepted respondent's argument that the excluded testimony of Wirken and the other witnesses would not have established *Strickland* prejudice. (A-6-9, 19, 16). ("These three potential witnesses could not negate the fact that they forged the letter or establish the Sapps' intent in forging the letter.") (*Id.* at 19). Even if that were true, the principals to the negotiations – none of whom testified at trial – were certainly competent to testify to the issue of materiality of the forged letter. Yet neither of the courts below even mention the term "materiality" or acknowledge this Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995).

On June 10, 1999, this Court issued its decision in *Neder v. United States*, ___ U.S. ___, No. 97-1985 (June 10, 1999). In *Neder*, case, a unanimous court concluded that for a defendant to be convicted under the federal bank fraud statute, codified under 18 U.S.C. § 1344, that the government must prove that the misrepresentation or concealment at issue involves a "material fact." Obviously, due to the timing of this Court's decision in *Neder*, the Court of Appeals' *Strickland v. Washington*, 466 U.S. 668 (1985) prejudice analysis did not take into account its holding that materiality was an essential element of bank fraud.

As Wirken's affidavit and the other excluded evidence establish, this testimony would have made a compelling case that petitioners' allegedly fraudulent conduct was immaterial because it was within the terms of previously negotiated agreements, the amount of the money was correct, and neither bank suffered any financial loss as a consequence. Under the circumstances of this case, it is likely that the Court of Appeals would decide the issue differently with the benefit of this Court's recent decision. Petitioners therefore respectfully request that this Court grant a writ of certiorari, vacate the judgment of the Court of Appeals, and remand this case to that court for reconsideration in light of *Neder v. United States*.

## II.

## CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A DEFENDANT IN A BANK FRAUD PROSECUTION WHO HAS ESTABLISHED THAT TRIAL COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HIS PERFORMANCE, INVOLVING COUNSEL'S LAW FIRM'S PRIOR AND ONGOING REPRESENTATION OF THE VICTIM/BANK AND ONE OF ITS OFFICERS, MUST MEET THE *STRICKLAND* PREJUDICE TEST TO RECEIVE A NEW TRIAL.

This is an unusual case in which defense counsel had an undisclosed attorney-client relationship with the victim of the alleged offense. Trial counsel, hindered by his firm's conflict of interest, failed to call any witness with first-hand knowledge of the transaction at issue, all of whom later signed affidavits attesting to the lack of materiality to petitioners' allegedly fraudulent conduct. Nevertheless, the court below ignored the materiality issue, ruling that the affidavits would not "negate [petitioners'] guilt," and therefore no relief was warranted. This conclusion is inconsistent with numerous decisions of this Court.

It has long been recognized as "an obvious truth" that a person "cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Counsel plays "a role that is critical to the ability of the adversary system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 686 (1985). Equally important to the reliability and integrity of the adversary system is "the assistance of an attorney unhindered by a conflict of interest." *Holloway v. Arkansas*, 435 U.S. 475, 483 n. 5 (1978). Because of the crucial role of counsel to our system of justice, the prejudice standard applied to

claims of ineffective assistance of counsel is modified where trial counsel is laboring under a conflict of interest:

> In a case of joint representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing. . . . It may be possible in some instances to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.

*Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978). In emphatically rejecting the suggestion that a defendant must show prejudice in order to be entitled to relief, the Court followed the time-worn principle set forth in *Glasser v. United States*, 315 U.S. 60 (1942):

> Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had a conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S. at 76. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.

*Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); accord, *Strickland v. Washington*, 466 U.S. at 692.

The central issue in petitioners' trial was whether their forged request for a distribution of $405,000 from Midland Bank to apply toward their indebtedness at First

State Bank pursuant to a loan discount/workout agreement was material to the transaction. Although petitioners readily admitted to their own counsel that they used First State Bank President David Herndon's signature without his permission, they mounted a credible defense that they acted without fraudulent intent. See (A-3). There was also substantial evidence available supporting the argument that petitioners' forgery of Herndon's signature was immaterial to the transaction. While it was incumbent upon the government to prove beyond a reasonable doubt that the allegedly forged letter was material to the transaction, the district court and the court below limited their discussion to the issue of intent, and finding sufficient evidence of that element of the crime, concluded that nothing counsel could have done would make a difference.[6] (A-10).

Petitioners alleged that their trial counsel had a conflict of interest arising from their undisclosed attorney/client relationship with the victim of the alleged offense, Midland Bank. Petitioners submitted sworn affidavits of attorneys representing both parties in the underlying transaction establishing that defendants acted within their rights under the agreement that was the subject of the prosecution. (A-38, 48, 51, 54). As this Court has recently made perfectly clear in *Neder v. United States*, No. 97-1995 (June 10, 1999), it was a viable alternative strategy to explain to the jury why the parties to the Midland agreement intended for the Sapps to have personal,

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[6] It is likely that the resolution of this issue in the court below would be different if reconsidered in light of this Court's recent decision in *Neder v. United States*, ___ U.S. ___, No. 97-1985 (June 10, 1999).

unfettered discretion in the distribution of their $850,000 line of credit, and that the unauthorized use of Herndon's signature had no impact on the ultimate transaction. However, proof of this strategy would require the production of evidence that counsel's other client, Midland Bank, had committed violations of federal banking statutes.[7] It is true that this strategy would have "thrown some mud at Midland," (A-10), but that is the basis for the conflict of interest, not the basis for admitting it into evidence. The evidentiary basis for receiving this evidence would be to exonerate the Sapps of any criminal intent in the distribution of their line credit. Although the trial attorneys did pursue portions of this line of defense, they omitted the most potent and powerful evidence – direct testimony of First State's and Midland's lawyers as well as petitioners' lawyers – establishing that their conduct was immaterial to the transaction.

Although acknowledging the rule of *Cuyler v. Sullivan*, 466 U.S. 335, 248 (1980), that petitioners need only demonstrate that a conflict of interest "adversely affected their counsel's performance," (A-9), the courts below held petitioners to a much higher standard of prejudice by imposing upon them the burden to "negate [their criminal] conduct in forging the letter." (A-10). To the contrary, it is unnecessary for petitioners even to show that the nonfeasance of their conflicted trial counsel could likely have affected the outcome of the trial; they need only show that their performance was adversely

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[7] Midland's Chairman, Lee Greif, was already under criminal investigation at the time of the Sapp's trial, and was eventually indicted. The Sapp's trial counsel participated in his defense.

affected. The failure of counsel to call any of the principle negotiators and drafters of the agreement, all of whom would have provided persuasive, admissible testimony on the elements of intent and materiality, amply satisfies petitioners' obligation to show that counsel's conflict adversely affected his performance. Thus, the decision of the court below is at odds with this Court's opinion in *Cuyler v. Sullivan*, 466 U.S. 335, 248 (1980).

## III.

## THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER TRIAL COUNSEL'S FAILURE TO CALL AS WITNESSES THE ATTORNEYS AND AN ACCOUNTANT THAT NEGOTIATED THE LOAN TRANSACTION UNDER WHICH PETITIONERS WERE LATER CONVICTED OF BANK FRAUD UNDER 18 U.S.C. § 1344, WHO WOULD HAVE TESTIFIED THAT PETITIONERS DID NOT ACT WITH AN INTENT TO DEFRAUD AND THAT THE ALLEGED FRAUDULENT ACT WAS NOT MATERIAL BECAUSE PETITIONERS WERE LEGALLY ENTITLED TO THE FUNDS THEY RECEIVED FROM THE VICTIM/BANK, ESTABLISH SUFFICIENT PREJUDICE TO BE ENTITLED TO A NEW TRIAL UNDER *STRICKLAND V. WASHINGTON.*

The Court below misapplied the *Strickland v. Washington*, 466 U.S. 668 (1989) prejudice standard when it dismissed petitioners' § 2255 motion based on its earlier finding on direct appeal that the evidence, viewed in a light most favorable to the government, was sufficient to sustain a conviction:

> After saying the false document that claimed to "release" defendants from their obligations, the jury could reasonably conclude that defendants

> were required to submit appropriate documentation before gaining access to the unauthorized funds and that they submitted the forged document to obtain the additional funds. **Viewing the evidence in the light most favorable to the government**, we conclude that the forged letter could reasonably be viewed as a false representation seeking to obtain funds from the bank."

(A-5). (Emphasis added). The Court of Appeals observed that this finding was "critical to our affirmance of defendants' convictions, *and our present analysis of their claims.*" Id. The court's analysis confuses the test for sufficiency of the evidence to sustain a conviction with the test for the prejudice prong of a claim of ineffective assistance of counsel.[8] In so ruling, the court below misapplied the prejudice standard:

> The second aspect of Bagley materiality bearing emphasis here is that *it is not a sufficiency of evidence test*. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

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[8] It is likely that the resolution of this issue in the court below would be different if reconsidered in light of this Court's recent decision in *Neder v. United States*, ___ U.S. ___, No. 97-1985 (June 10, 1999).

*Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (emphasis added). In this case, the jury deliberated on the issue of whether petitioners acted with criminal intent or made any material misrepresentation without the benefit of the lawyers and bankers who negotiated and drafted the agreement which formed the basis of the indictment.

The evidence which defense counsel failed to offer includes testimony of credible witnesses with first-hand knowledge of the case. James Wirken could have testified that First State Bank and its lawyer, Pete Peterson, explicitly admitted that the allegedly forged letter was "immaterial to them," (A-41), and that the substantive terms of the allegedly forged letter "was not outside the terms" of the Sapps' settlement agreement with First State. (A-42). Attorneys Brian McCallister and Chris Henry, who participated in negotiations on behalf of petitioners and Midland, respectively, would have testified that the parties intended to give the Sapp brothers discretionary use of the funds in question. (A-52, 55). In other words, the jury could have been informed that in essence, petitioners were accused of trying to steal their own money. Mr. Wirken makes this fact crystal clear, "If Midland Bank had refused to disburse the money as requested by the Sapps, Ron and Fletcher Sapp would have a legitimate cause of action against [Midland] for breach of the February 7, 1991 Agreement." (A-43).

In light of this evidence, the verdict in this case cannot withstand an appropriate *Strickland* prejudice inquiry, conducted with an awareness of all the constituent elements in the case, particularly the element of materiality. Petitioners respectfully request this Court to grant certiorari, vacate the decision below, and remand for

reconsideration in light of this Court's decision in *Neder v. United States.*

## IV.

## CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT COURT'S REFUSAL TO ALLOW PETITIONERS TO CONDUCT DISCOVERY, WHICH WAS LATER UPHELD BY THE COURT OF APPEALS, CONFLICTS WITH THIS COURT'S OPINION IN *BRACY V. GRAMLEY.*

Before the district court, petitioners requested discovery to aid them in obtaining the factual foundation necessary to establish their constitutional claims for relief. Petitioners requested leave to discover, by production of documents, depositions, requests for admissions and/or interrogatories, information relevant to several of the constitutional claims that were presented in the district court. Petitioners' discovery motion specifically requested that the court order disclosure of FDIC and FBI investigative files regarding Bruce Rhoades, Lee Greif and Midland Bank, billing records of Stinson, Mag & Fizzell for their representation of Lee Greif and/or Midland Bank, and its corporate affiliates, the minutes of the discount committee and/or the board of directors of First State Bank and Midland Bank of Kansas regarding petitioners' loan agreements. Petitioners also requested leave to take Rhoades' and Herndon's depositions.

Counsel for petitioners expressed a good faith belief that this discovery was likely to produce important and relevant evidence that would assist the court in arriving at a fair and reliable resolution of the constitutional issues in this § 2255 case. Both the district court and later the Court of Appeals, however, summarily denied these

requests for discovery. (A-14; 26, 35-36). In light of the substance of the constitutional claims involved and the likelihood that the discovery would have produced important and relevant evidence, the district court's refusal to grant discovery was clearly erroneous and conflicts with this Court's opinion in *Bracy v. Gramley*, 520 U.S. 899 (1997).

The district court's refusal to grant discovery is particularly offensive due to the fact that, in regard to the conflict of interest and prosecutorial misconduct claims, the court essentially denied relief because insufficient proof was presented that petitioners' lawyer had an ongoing attorney/client relationship or that the prosecution presented materially false evidence. (A-23, 26). The district court's ruling in this regard presents a classic "Catch-22;" the district court refused to allow petitioners access to the evidence they needed to prove their claims and then denied relief because petitioners presented insufficient evidence. (*Id.*) This was patently unfair.

The error of the courts below in denying discovery is particularly glaring in regard to petitioners' conflict of interest claim. In the course of a subsequent civil lawsuit that petitioners brought against Lee Greif in which they obtained a substantial judgment, petitioners learned of Stinson, Mag's representation of Midland Bank and Lee Greif in 1984 and 1985. (A-59-60). During the discovery process in that civil case, Stinson, Mag & Fizzell refused to reveal whether they had an ongoing relationship with Greif and Midland Bank at the time of petitioners' trial by successfully asserting attorney/client privilege. Before that time, petitioners had no idea that Stinson, Mag & Fizzell had represented Greif and Midland Bank other

than consulting with Greif's attorneys in a federal criminal prosecution that later landed Greif in prison for illegal banking practices. (A-56-58).

The requested discovery of billing records was reasonable and necessary to establish that Stinson, Mag & Fizzell had an ongoing relationship with Midland and Greif at the time of petitioners' trial which created an inherent conflict of interest motivating trial counsel to conceal from petitioners' jury the fact that Greif's illegal conduct precipitated the loan agreement that formed the basis for the bank fraud charges in this case. The district court specifically noted that petitioners were unable to establish an ongoing attorney/client relationship between Midland and Greif and this law firm in denying relief on this claim. (A-23).

The district court's refusal to grant discovery on this conflict of interest claim conflicts with this Court's holding in *Bracy v. Gramley*, 520 U.S. 899 (1997). As was the case with the underlying constitutional claim in *Bracy*, there can be little dispute that the petitioners' conflict of interest claims made allegations that, if proved, would establish an actual conflict of interest establishing a Sixth Amendment violation requiring a new trial. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). The district court's refusal to grant discovery to allow petitioners to fully develop the factual basis for their conflict of interest claim is also at odds with decisions from other circuits. Rule 10(a). When confronted with similar threshold showings that trial counsel labored under an actual conflict of interest, other courts of appeal have held that state and federal prisoners are entitled to discovery and/or an evidentiary hearing. *United States v. Hearst*, 638 F.2d 1190,

1193-1194 (9th Cir. 1980); *Perillo v. Johnson*, 79 F.3d 441, 444-445 (5th Cir. 1996).

The facts in *Perillo* are particularly analogous to those of this case. The conflict in *Perillo* involved trial counsel's previous and simultaneous representation of a capital murder defendant and a prosecution witness. *Id.* at 444. During Perillo's trial, her counsel negotiated an immunity agreement for this witness, who later testified against her. *Id.* In ordering discovery and an evidentiary hearing, the Fifth Circuit found that Perillo established an actual conflict that adversely affected counsel's performance because he failed to pursue alternative strategies to preclude this witness from testifying or, vigorously attack her credibility at trial. *Id.* at 449-451. As in *Perillo*, petitioners' trial counsel's conflicting interests motivated him not to bring up the fact that Midland Bank's and Lee Greif's criminal conduct in prior loans to petitioners precipitated the loan agreement under which petitioners were later convicted of bank fraud. Like *Perillo*, discovery should be granted to allow petitioners to develop and expose the extent of this conflict and the resulting consequences so that this claim can be fairly and accurately resolved.

The dispositive question is whether petitioners established "good cause," entitling them to discovery under Rule 6(a) of the rules governing § 2255 cases. This is not a close question. Based upon Stinson, Mag's assertion of attorney/client privilege during the aforementioned civil suit against Greif, there is a strong inference that they maintained an attorney/client relationship with Greif and Midland Bank before, during, and after petitioners' trial for bank fraud. The present record also raises a strong inference that this actual and ongoing conflict adversely

affected trial counsel's performance because he failed to accurately portray to the jury that Greif's criminal conduct motivated and necessitated the loan agreement that served as the foundation for the subsequent bank fraud prosecution. (A-38-41).

Similarly, the evidence that Bruce Rhoades, the government's only witness representing the alleged victim, Midland Bank, was under investigation by the FDIC, and perhaps the U.S. Attorney, for fraudulent banking practices which included matters related to the Midland-Sapp agreement. The district court erroneously stated that petitioners had given the court "no definite idea . . . why this information would be relevant," ignoring petitioners' detailed arguments concerning Rhoades' misconduct and motive to cooperate with the government.[9] The court below also criticized petitioners for failing to prove that "Rhoades came under investigation before or during the time of his trial." (A-26).[10] That ruling is at odds with the court's refusal to permit discovery of that very evidence.

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[9] Petitioners through the Freedom of Information Act obtained and filed in the district court a consent decree between Rhoades and the FDIC, attached as Exhibit C to their Rule 33 Motion. The decree indicates that Rhoades was banned from banking because of findings that he engaged in "unsound banking practices" and "breaches of his fiduciary duty," as a result of which Rhoades "received financial gain or other benefit." (*Id.* p.2). The decree recites conduct contemporaneous with the events leading to the prosecution of petitioners. *Id.*

[10] This reasoning ignores petitioners' allegation in the district court that as early as March, 1993, Rhoades had hired counsel, Charles German, to represent him, and FBI agents interviewed Rhoades at German's law office on March 15, 1993. Rhoades undoubtedly harbored hopes of lenient treatment as a result of his cooperation with the government.

Petitioners did allege that Midland's assets were seized by the FDIC prior to the Sapps' trial, and that after the Sapps' trial, Rhoades was banned from banking for conduct that took place before, during and after the events for which the Sapps were indicted.

The circumstantial evidence of a conflict of interest, and Rhoades' undisclosed incentive to cooperate with the government, is at least as strong as the evidence of judicial bias that entitled the petitioner to discovery in *Bracy*. 520 U.S. at 906-908. Certiorari should be granted and the case should be remanded to the district court with directions to allow the requested discovery.

## CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FLETCHER SAPP; RONALD SAPP, Defendants-Appellants. | ) ) ) ) ) ) ) ) | No. 97-3384 (D.C. No. 97-CV-3181-DES) (D. Kan.) (Filed Dec. 18, 1998) |

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**ORDER AND JUDGMENT***

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Before **BRORBY, BRISCOE,** and **LUCERO,** Circuit Judges.

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After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Brothers Fletcher and Ronald Sapp were convicted of bank fraud in violation of 18 U.S.C. § 1344(2), sentenced to serve twenty-one months in prison and five years on supervised release, and ordered to pay $279,000 in restitution. This court affirmed their convictions and sentences on direct appeal. *See United States v. Sapp*, 53 F.3d 1100 (10th Cir. 1995) (*"Sapp I"*). Defendants subsequently filed a motion to vacate, set aside or correct their sentences pursuant to 28 U.S.C. § 2255 and a motion for a new trial pursuant to Fed. R. Crim. P. 33. The district court consolidated the two motions and denied them. *See United States v. Sapp*, 989 F. Supp. 1093 (D. Kan. 1997) (*"Sapp II"*). Because the district court did not hold an evidentiary hearing and make factual findings, we review its denial of defendants' § 2255 motion de novo. *See United States v. Powell*, ___ F.3d ___, No. 97-1449, 1998 WL 730159, *1 (10th Cir. Oct. 20, 1998). We review its denial of the motion for a new trial for an abuse of discretion. *See United States v. Patterson*, 41 F.3d 577, 579-80 (10th Cir. 1994).

The district court summarized the background leading to defendants' convictions as follows:

> The defendants are brothers who jointly operated a number of businesses. In 1990, the defendants began experiencing financial difficulties. After the defendants defaulted on some of their loans at First State Bank ("First State"), they began negotiating for additional funds from Midland Bank ("Midland") to pay off some of their debts at First State. At the same time, defendants attempted to persuade First State to discount some of their delinquent loans.

First State agreed to discount some of defendants' outstanding loans by approximately $279,000, leaving them $280,000 in debt on the discounted loans, which First State thought would be paid by funds that the Sapps were going to obtain from Midland. This agreement also allowed the defendants to bring other loans current and to turn over the collateral in full satisfaction of other loans. Meanwhile, defendants reached an agreement with Midland that allowed "$850,000 to be made available to [defendants] to settle pending litigation and their indebtedness at First State."[1] In order to draw on the funds, the Midland agreement stated that the defendants needed both Midland's approval and releases of their indebtedness with other creditors.

Defendants then forged a letter from First State to Midland. The forged letter requested payment of approximately $405,000 to settle defendants' debt to First State, which was $125,000 more than was needed to pay off the discounted loans. Before disbursing the loan monies, however, Midland discovered the discrepancy between the amount requested in the letter and the amount First State expected the Sapps to request to pay off the discounted loans. When confronted with the forgery, the defendants admitted forging the letter.

*Sapp II*, 989 F. Supp. at 1097-98.

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[1] This transaction was only a portion of the overall loan agreement dated February 7, 1991, between defendants, Ruth Sapp, Janet Sapp, businesses the Sapps owned or controlled, and Midland. The overall loan agreement involved four separate loans totaling $15,450,000. The $850,000 was made available to Fletcher and Ron as part of a loan for $2,000,000 for which the borrowers were Fletcher and Ruth Sapp.

Defendants raise the following arguments on this appeal: (1) defendants were denied their rights to effective assistance of trial counsel by counsel's failure to call certain rebuttal witnesses and to impeach a government witness; (2) counsel was ineffective due to a conflict of interest resulting from his firm's past representation of Midland and one of its officers; (3) the government failed to disclose material exculpatory evidence; (4) the government presented evidence it knew or should have known was false; (5) the district court abused its discretion in failing to grant a new trial based on newly discovered evidence; and (6) the district court abused its discretion by refusing to allow discovery or hold an evidentiary hearing.

As the district court recognized, and the government on appeal emphasizes, most of defendants' arguments revolve around their claim that they had virtually unfettered access to the $850,000 and that the ineffectiveness of their counsel and the government's improper actions prevented the jury from understanding this fact. As we noted in rejecting defendants' claim of insufficient evidence on direct appeal, defendants presented this theory of defense and the jury rejected it:

> Defendants argue that they could have properly withdrawn the $850,000 from Midland for their personal use and therefore could not be guilty of bank fraud. The jury considered and rejected this contention. A bank officer [Bruce Rhoades] testified that two conditions needed to be met before any funds were released to defendants: (1) the bank had to approve the disbursement, and (2) defendants had to submit the appropriate releases from their other creditors. Although

> defendants disputed the bank officer's testimony at trial, their decision to forge a release supports the bank officer's position. After seeing the false document that claimed to "release" defendants from their obligations, the jury could reasonably conclude that defendants were required to submit appropriate documentation before gaining access to the authorized funds and that they submitted the forged document to obtain the additional funds.
>
> Viewing the evidence in the light most favorable to the government, we conclude that the forged letter could reasonably be viewed as a false representation seeking to obtain funds from the bank. We therefore hold that the evidence was sufficient to convict defendants of bank fraud under section 1344(2).

*Sapp I*, 53 F.3d at 1103. Thus, critical to our affirmance of defendants' convictions, and our present analysis of their claims, were the jury's findings that they were required to submit valid and appropriate documentation to draw on the loan, and that they submitted forged documentation.

1. *Ineffective counsel for failure to present rebuttal or impeachment testimony*

To establish a claim of ineffective assistance of counsel, defendants must show both that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced their defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 690 (1984). To prove prejudice, defendants must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Rogers v. United States*, 91 F.2d 1388, 1392 (10th Cir. 1996) (citations and quotations omitted), *cert. denied*, 117 S. Ct. 1000 (1997).

Defendants contend that their trial counsel was ineffective for failing to present the testimony of Lee Greif, Chris Henry, James Wirkin and Brian McCallister, who they contend were the principal negotiators of the loan agreement between the Sapps and Midland, and the testimony of certified public accountant Larry Morris. They contend that Greif, Henry, Wirkin and/or McCallister would have testified that Midland agreed to loan the money to the Sapps because it partially caused their financial problems, that the Sapps had a right to the full $850,000, that any surplus remaining after First State and other creditors were paid would be disbursed to the Sapps, and that Bruce Rhoades was not involved in negotiating the Midland-Sapp agreement. They also contend that counsel should have impeached Rhoades' testimony generally with the fact that he was being investigated by the FDIC and eventually was banned from banking, and his specific testimony implying that Midland intended the entire $850,000 to go to First State with contrary testimony.

Defendants fail to show, however, how this proposed testimony or impeachment would have affected the jury's findings that they were required to submit appropriate documentation to obtain funds from Midland and they submitted forged documentation. Rhoades did testify that Midland had to approve loan disbursements and that releases were required, but he was essentially repeating

what the loan agreement stated.[2] Thus, his testimony on this point was not seriously impeachable.

The only evidence directly relating to the release that defendants contend counsel should have presented is Henry's proposed testimony that "[i]t was contemplated by the parties to the Loan Agreement that the 'release' language as pertains to the Sapps debt at [First State] would be satisfied by copies of the notes marked 'Paid' from [First State], in the normal course of business, after receipt by [First State] of wired funds from [Midland]." Appellants' App. Vol. I at 43. Defendants thus do not challenge the jury's finding that the agreement required the submission of "appropriate documentation" as a material condition for disbursement of the funds. At most, they contend that counsel could have presented evidence indicating that documentation submitted after the disbursement could satisfy this condition. They have not, however, shown that the timing of the submission of the documentation was critical to the jury's decision (or our affirmance on direct appeal). More importantly, they have not shown that anything counsel could have done would have affected the jury's implicit finding that they intended the forged release to serve as the required documentation. Indeed, we can see no reason why defendants, who admit they participated in the negotiation of the agreement themselves and presumably understood its

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[2] The loan agreement stated that disbursements of any part of the $850,000 "shall be subject to approval by Bank [Midland], and the submission by Borrowers [the Sapps] of appropriate court orders or releases indicating satisfaction of Borrowers' debts to their creditors. The surplus shall be disbursed to Borrowers." Appellee's Suppl. App. at 529.

requirements, would have drafted the forged letter as a release had they not intended it to serve as the documentation required by the agreement.[3] We thus agree with the district court that defendants have not met their burden of proving prejudice from counsel's failure to call these witnesses or to further impeach Rhoades.

Defendants also contend that counsel should have presented testimony from Wirkin, Henry, McCallister and Morris to impeach the testimony of David Herndon, First State's president. They contend that Wirkin, Henry and McCallister would have testified that it was immaterial to Herndon where the Sapps obtained the funds to pay off their various First State loans. They also contend that Morris would have testified that the forged letter accurately reflected the terms of their agreement with First State, although they fail to explain what Morris' specific testimony would have been. Counsel did present evidence and argument to this effect at trial, including correspondence from Herndon indicating that the source of

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[3] The letter defendants forged stated in part as follows:

> For the payment of $405,014.88 dollars [sic], the following loans will be paid off, or brought current. Upon receipt of this payment, both parties hereby mutually release each party from any and all claims each may have, liquidated or unliquidated, known or unknown through the date of payment. . . .
>
> . . . .
>
> The above numbers and agreements are hereby acknowledge [sic] and agreed to, and this request is hereby submitted for payment to Midland Bank of Kansas.

Appellee's Suppl. App. at 548-49.

funds did not matter and that First State subsequently settled some of defendants' delinquent loans on terms similar to those contained in the forged letter. Counsel is not ineffective for failing to present cumulative evidence. *See Medina v. Barnes*, 71 F.3d 363, 367 (10th Cir. 1995). Again, defendants have failed to show that presentation of this evidence would likely have changed the outcome of the trial, and we agree with the district court that this ineffective counsel claim fails because they have not met their burden of proving prejudice.

2. *Ineffective counsel due to conflict of interest*

Defendants claim that their trial counsel was ineffective because of a conflict of interest due to his firm's prior representation of Midland and Midland officer, Lee Greif. Because they did not raise this objection at trial, they must show that an actual conflict of interest adversely affected their counsel's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). "An actual conflict of interest results if counsel was forced to make choices advancing other interests to the detriment of his client. Without a showing of inconsistent interests, any alleged conflict remains hypothetical, and does not constitute ineffective assistance." *United States v. Alvarez*, 137 F.3d 1249, 1252 (10th Cir. 1998) (citation omitted). "[C]ounsel's performance is adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy was available to defense counsel, but it was inherently in conflict with his duties to others. . . ." *United States v. Migliaccio*, 34 F.3d 1517, 1526 (10th Cir. 1994) (quotation omitted).

Defendants contend that because of his conflict of interest, counsel failed to present evidence regarding the reason that Midland agreed to loan the money to the Sapps in the first place – i.e., "that the Sapps' indebtedness at First State Bank was only part of the mutual consideration [for the loan]; the funds were intended to enable the Sapps to pay other creditors and to compensate them for damage they suffered through [Midland officer] Greif's unlawful conduct." Appellants' Br. at 31. In other words, defendants contend that counsel should have thrown some mud at Midland to show that, in agreeing to loan money to the Sapps, it was not "an innocent business institution motivated by a desire to save a financially troubled customer." *Id.* at 32. We agree with the district court that this strategy "would not negate the defendants' conduct in forging the letter," and that given the basis for defendants' convictions, they "have not shown how this would be a plausible alternative defense strategy." *Sapp II*, 989 F. Supp. at 1101. We thus reject their claim of ineffective counsel due to a conflict of interest.

3. *Brady violation*

Defendants contend that the government violated the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence favorable to them. To establish a Brady violation, defendants must prove that "the prosecution suppressed the evidence, the evidence would have been favorable to [them], and the suppressed evidence was material." *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) (quotation omitted). Evidence is material "if there is a reasonable probability that, had the evidence

been disclosed to the defense, the result of the proceedings would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (quotation omitted).

The evidence defendants claim the government should have produced was a criminal report regarding their forgery filed by David Herndon with the FDIC and evidence regarding FBI and FDIC investigations of Bruce Rhoades. Although the district court addressed the Herndon report on the merits, we may affirm on any basis supported by the record. *United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994). Defendants admit they were aware of the report during the trial, as there were "passing references to the report by defense counsel in cross-examination of Herndon." Appellants' Br. at 36. In the district court, the government contended that defendants were procedurally barred from raising this issue under *United States v. Frady*, 456 U.S. 152, 167-68 (1982), because they failed to show cause for failing to raise it on direct appeal and could not show resulting prejudice. *See* Appellants' App. at 189-90. In response to the government's contention, defendants did not attempt to show cause for failing to raise this issue earlier. *See* Appellants' App. Vol. I at 285-87. We therefore conclude that the issue is procedurally barred and will not consider it.

It is not clear whether Rhoades was even being investigated at the time of trial and whether the government had any evidence on this matter to disclose. Defendants therefore want discovery on this issue. However, as we noted earlier and the district court concluded, using this information to impeach Rhoades would not have affected the outcome of the trial. The evidence therefore was not material under Brady.

4. *Presentation of perjured testimony*

Defendants contend that the government presented testimony by Rhoades and Herndon that it knew or should have known was false. Again, while the district court addressed defendants' claims on the merits – and we have no reason to question its analysis in this regard – the government argued in the district court that this claim was procedurally barred because defendants failed to raise it on direct appeal. In response, defendants did not present any reason justifying this failure. We therefore conclude this claim is procedurally barred and will not consider it.

5. *Newly discovered evidence*

Defendants contend that three pieces of evidence are newly discovered and warrant a new trial. To justify a new trial based on newly discovered evidence, "the alleged newly discovered evidence [must] be (1) more than impeaching or cumulative, (2) material to the issues involved, (3) such that it would probably produce an acquittal, and (4) such that it could not have been discovered with reasonable diligence and produced at trial." *United States v. Trujillo*, 136 F.3d 1388, 1394 (10th Cir.), *cert. denied*, 119 S. Ct. 87 (1998).

Defendants contend that two pieces of newly discovered evidence relating to Bruce Rhoades' testimony warrant a new trial. The first is his affidavit in which, they contend, he recanted his trial testimony. In his affidavit, Rhoades did not recant, in the sense that he specifically withdrew or repudiated, any trial testimony. He did say that he was not a party to the negotiation or drafting of

the loan agreement, while at trial, he answered "[b]asically, yes" to the question "[d]o you remember negotiating the terms of this [overall] agreement with the defendants." Appellee's Suppl. App. at 566.[4] The district court found that, because Rhoades admitted on cross-examination that he was not "a party to all those negotiations," *id.* at 579, the affidavit was consistent with his trial testimony and could not be considered newly discovered evidence. Defendants also contend that the evidence that Rhoades was banned from the banking industry by the FDIC is newly discovered and warrants a new trial. The district court found that this evidence could only be used to impeach Rhoades and therefore could not justify a new trial. We also note that, given our previous discussion regarding the basis of defendants' convictions, presentation of this evidence would not likely result in an acquittal. We thus conclude that the court did not abuse its discretion in denying the motion for a new trial on these bases.

Defendants also contend that David Herndon's answers to interrogatories in separate litigation, in which he indicated that the source and amount of funds the Sapps could borrow to pay the First State debt did not matter to him, is newly discovered evidence warranting a new trial. The district court found that the answers to the interrogatories were not inconsistent with Herndon's trial testimony. Additionally, as we noted earlier, other evidence to this effect was presented at trial, and this evidence would therefore be merely cumulative. Again,

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[4] As noted earlier, the $850,000 loan was only a relatively small part of the entire February 7, 1991 loan agreement.

defendants have failed to demonstrate that the court abused its discretion in denying a new trial on this basis.

6. *Request for discovery and evidentiary hearing*

Defendants contend that the district court should have allowed them to conduct discovery on certain issues and should have held an evidentiary hearing. Both of these matters are subject to the district court's discretion. *See Castro v. Ward*, 138 F.3d 810, 833 (10th Cir.) (discovery), *cert. denied*, No. 98-5936, 1998 WL 635781 (U.S. Nov. 2, 1998); *United States v. Whalen*, 976 F.2d 1346, 1348 (10th Cir. 1992) (evidentiary hearing). Defendants have identified no areas of discovery likely to affect our preceding analysis. Similarly, they have failed to identify any material factual issues in dispute that would warrant an evidentiary hearing. We therefore conclude that the district court did not abuse its discretion in denying their requests for discovery and an evidentiary hearing.

Defendants' motion to file a reply brief is GRANTED. The judgment of the district court is AFFIRMED.

Entered for the Court

Carlos F. Lucero
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>FLETCHER SAPP and RONALD SAPP,<br>Defendants. | Case No.<br>93-20064-02-DES<br>97-3181-01-DES<br>(Filed Dec. 8, 1997) |

## MEMORANDUM AND ORDER

This matter is before the court on defendants' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 120), defendants' Motion for New Trial, defendants' Motion to Authorize Discovery (Doc. 137), defendants' Motion to Expand the Record and for Other Appropriate Relief (Doc. 136), defendants' Motion for Evidentiary Hearing (Doc. 140), and defendants' Motion for Pre-Trial Conference (Doc. 143). For the reasons discussed below, all of the above motions are denied.

## I. INTRODUCTION

The defendants are brothers who jointly operated a number of businesses. In 1990, the defendants began experiencing financial difficulties. After the defendants defaulted on some of their loans at First State Bank ("First State"), they began negotiating for additional funds from

Midland Bank ("Midland") to pay off some of their debts at First State. At the same time, defendants attempted to persuade First State to discount some of their delinquent loans.

First State agreed to discount some of defendants' outstanding loans by approximately $279,000, leaving them $280,000 in debt on the discounted loans, which First State thought would be paid by funds that the Sapps were going to obtain from Midland. This agreement also allowed the defendants to bring other loans current and to turn over the collateral in full satisfaction of other loans. Meanwhile, defendants reached an agreement with Midland that allowed "$850,000 to be made available to [defendants] to settle pending litigation and their indebtedness at First State." In order to draw on the funds, the Midland agreement stated that the defendants needed both Midland's approval and releases of their indebtedness with other creditors.

Defendants then forged a letter from First State to Midland. The forged letter requested payment of approximately $405,000 to settle defendants' debt to First State, which was $125,000 more than was needed to pay off the discounted loans. Before disbursing the loan monies, however, Midland discovered the discrepancy between the amount requested in the letter and the amount First State expected the Sapps to request to pay off the discounted loans. When confronted with the forgery, the defendants admitted forging the letter.

The defendants were charged with violating 18 U.S.C. §§ 1014 and 1344(2). The jury found the defendants guilty of bank fraud in violation of 18 U.S.C. § 1344(2),

but acquitted them of making a false statement to a federally insured financial institution in violation of 18 U.S.C. § 1014. The defendants were each sentenced to twenty-one months incarceration and were ordered to pay $279,000 jointly in restitution to First State. Defendants appealed their convictions and sentences to the Tenth Circuit Court of Appeals, which affirmed the results reached by the trial court.

## II. DISCUSSION

### A. Ineffective Assistance of Counsel Because Trial Counsel Failed to Present Certain Testimony and Evidence

The defendants claim that they were denied the effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution. To establish a claim of ineffective assistance of counsel, the defendants must show: (1) "that counsel's representation fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 688 (1984); and (2) "that the deficient performance prejudiced the defense." *Id.* at 687. In order to meet the second prong of this test, the defendants must demonstrate "that counsel's errors were so serious as to deprive the defendant[s] of a fair trial, a trial whose result is reliable." *Id.* There is a presumption that the attorney's conduct comes within "the wide range of reasonable professional assistance." *Id.* at 68.

In this case, the defendants make the following allegations to support their ineffective assistance of counsel claim: (1) that their trial counsel should have presented testimony from James Wirken and Brian McCallister,

attorneys who represented the defendants in negotiations to settle lender liability claims against Midland; (2) that their trial counsel should have presented testimony from Chris Henry, the attorney who represented Midland during the negotiations of the lender liability claims; (3) that their trial counsel should have presented testimony from Lee Greif, chairman and majority shareholder of Midland who participated in the negotiations of the lender liability claims; (4) that their trial counsel should have presented evidence that Bruce Rhoades, a government witness and president of Midland, was under investigation for conduct for which he was eventually banned from employment in the banking industry; and (5) that their trial counsel should have elicited testimony from Larry Morris, a CPA who testified on behalf of the defendants, that the figures in the forged letter were an accurate reflection of the settlement agreement that the defendants had with First State.

To support defendants' first and second allegations on this claim, the defendants assert that James Wirken, Brian McCallister, and Chris Henry would have testified that they, along with the Sapps and Lee Greif, were the parties involved in negotiating the settlement which revolved around the $850,000 line of credit, which was at issue in this case, and that Bruce Rhoades was not involved in the negotiations as he testified at trial. Furthermore, the defendants assert that these three attorneys would have testified that the line of credit was part of the settlement of the Sapps' lender liability claims against Midland, that it was the intent of the parties that the Sapps would have personal access to part of the line of credit, and that the line of credit would be used to pay

off other creditors besides First State, in opposition to the testimony of Bruce Rhoades.

The court has extensively reviewed Bruce Rhoades' testimony in connection with this and other claims made by the defendants and concludes that the defendants were not prejudiced by the failure of trial counsel to call these witnesses to rebut the testimony of Bruce Rhoades. Rhoades himself admitted, on cross-examination, that he was not personally involved in all of the negotiations for the $850,000 line of credit at Midland, Rhoades Tr. at 72-73; that the line of credit was established, in part, to prevent the Sapps from suing Midland, *Id.* at 72; and that money from that line of credit was, in fact, disbursed to the Sapps personally and to other creditors. *Id.* at 78.

Furthermore, the defendants were convicted of bank fraud based upon the letter bearing the forged signature of First State's president, David Herndon, in which they requested a larger amount of money than was anticipated by First State. The testimony of these three witnesses would be to establish the intent of the parties to the settlement with Midland and to discredit Bruce Rhoades. Thus, these three potential witnesses could not offer any evidence which would negate the fact that they forged Herndon's signature on the letter or establish the Sapps' intent in forging the letter; nor, could any of these three testify regarding the terms of the agreement with First State. Therefore, the court concludes that, even assuming that their trial counsel's representation fell below an objective standard of reasonableness, the defendants were not prejudiced by the failure to call these three attorneys as witnesses.

In their third allegation on this claim, the defendants assert that their trial counsel should have called Lee Greif, chairman of Midland and a participant in the negotiations for the Midland settlement, as a witness. The court finds that the above discussion regarding the three attorneys applies to Lee Greif, as well. In addition, the court notes that the government has presented an affidavit from Lee Greif's attorney that he would have been advised to assert his Fifth Amendment rights and decline to answer any substantive questions. Thus, it seems very unlikely that the defendants would have obtained any helpful testimony from Greif, and the court concludes that they were not prejudiced by the failure to call this witness.

For their fourth allegation on this claim, the defendants assert that their attorneys failed to present evidence that Bruce Rhoades was under investigation for conduct for which he was banned from employment in the banking industry. Again, the only purpose this evidence would have served would be to attempt to discredit Rhoades. The defendants' trial counsel did discredit Rhoades on cross-examination in all of the areas discussed above. Furthermore, neither side has presented any evidence which would indicate whether the investigation of Rhoades had commenced at the time of this trial. Rhoades did not enter into a consent agreement with the FDIC until December of 1995. However, even if the investigation had been commenced by the time of this trial, this evidence would not have addressed the conduct for which the Sapps were convicted. It would only have served to further discredit Rhoades. Thus, even assuming that trial counsel's performance fell below an objective

standard of reasonableness, the court concludes that the defendants were not prejudiced by the failure to introduce this evidence.

The last allegation presented by the defendants on this claim for ineffective assistance of counsel is that their trial counsel should have elicited testimony from Larry Morris, the CPA who assisted the Sapps with their defense, to the effect that the terms of the forged letter were an accurate reflection of the terms of the First State settlement. The court found in its review of the record that trial counsel put forth this theory at trial, although Larry Morris was not questioned on this theory. The jury apparently found the testimony of Herndon to be more persuasive. Therefore, the court again concludes that the defendants were not prejudiced by the failure to elicit this testimony. Thus, the defendants have failed to establish that they were denied the effective assistance of counsel on this claim.

**B. Ineffective Assistance of Counsel Because the Defendants' Counsel had a Conflict of Interest**

In support of this claim, the defendants allege that the firm of Stinson, Mag & Fizzell, which originally served as joint counsel for the defendants and continued to serve as lead counsel after Fletcher Sapp obtained separate counsel, had a conflict of interest because the firm had represented Lee Greif and Midland. Furthermore, the defendants allege that the firm obtained a waiver of the conflict from Greif, but not from the defendants. The defendants allege that the firm did not call Greif, Henry, Wirken, or McCallister as witnesses as a

result of this conflict and the firm's efforts to protect Greif.

Rule 83.6.1(a) for the United States District Court for the District of Kansas states that this court has adopted the Model Rules of Professional Conduct, as adopted by the Kansas Supreme Court, as the standard for the professional conduct of attorneys practicing before this court. Rule 1.9 of the Model Rules of Professional Conduct, as adopted by the Kansas Supreme Court, states as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter:

> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (emphasis added). This differs from the general rule governing conflicts of interest found in Rule 1.7, which states as follows:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (emphasis added).

In this case, the defendants have not submitted any evidence that Stinson, Mag & Fizzell had an ongoing attorney-client relationship with Greif and Midland at the time that they were representing the Sapps. In fact, their allegations and evidence supports a finding that Greif and Midland were former clients of Stinson, Mag & Fizzell. All of the billing documents and letters submitted to show an attorney-client relationship between Greif, Midland, and Stinson, Mag & Fizzell are dated 1984 and 1985. In addition, all of these documents appear to relate to the creation of Midland, not to any of the actions which were at issue in this case. Therefore, the actions of Stinson, Mag & Fizzell were in accordance with Rule 1.9, and the Sapps were not required to sign a waiver.

Even if there was an ongoing attorney-client relationship, the defendants must show that there was (1) an actual conflict of interest and (2) that the conflict adversely affected their attorney's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

> [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. . . . But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. . . . [T]he possibility of conflict is insufficient to impugn a criminal conviction.

*Id.* at 349-50 (citations omitted). Furthermore, in order to prove an actual conflict existed, the defendants must show (1) "that some plausible alternative defense strategy or tactic might have been pursued" and (2) "that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985); *accord, United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990).

The defendants claim that this conflict prevented their attorneys from calling any of the people who participated in the negotiations of the Midland agreement as witnesses. However, defendants have not shown how this would be a plausible alternative defense strategy nor how the alternative defense was in conflict with the attorney's other loyalties. The only purpose for the testimony of these witnesses would be to impeach or discredit Rhoades. The testimony of these witnesses would not negate

the defendants' conduct in forging the letter. Therefore, the court concludes that the defendants have not shown an actual conflict or an adverse effect on their representation. As a result, the court finds that the defendants have failed to show that they were denied the effective assistance of counsel.

### C. Violation of Fifth Amendment Right to Due Process Because Prosecution Failed to Disclose Material Exculpatory Evidence

For this claim, the defendants specifically allege that the government withheld a statement made by Herndon in a criminal referral filed with the FDIC, which was forwarded to the United States Attorney's Office, and that the government withheld information relating to Rhoades' conduct which caused him to be banned from employment in the banking industry. With regard to the defendants' claim that they were denied access to the criminal referral filed by Herndon, the court concludes that this allegation is without merit. Not only did the government provide the defendant with the opportunity to inspect its file, a review of the trial transcript reveals that the defense attorneys at trial did have access to the criminal referral because they cross-examined Herndon about information in the referral.

With regard to the defendants' allegation that the government withheld information concerning Rhoades' conduct which could have been used to discredit Rhoades at trial, the court notes that the defendants have presented no argument on this allegation in their supporting

memorandum for their § 2255 motion. Instead, the defendants have simply requested additional discovery, claiming that the specifics regarding the conduct of Rhoades and Greif, along with the relevance to the defendants' case, "remain peculiarly available to the government." The defendants have given the court no definite idea of what they would hope to find in such further discovery, much less why this information would be relevant. Defendants were already aware of Midland's misconduct, through Greif and Rhoades, as it pertained to this case at the time of trial. Furthermore, the defendants have not even alleged that Rhoades came under investigation before or during the time of this trial. As previously mentioned, Rhoades did not enter into a consent agreement with the FDIC to be banned from employment in banking until December of 1995, and the order was not issued by the FDIC until 1996. Thus, there is no evidence to show that the government withheld information relating to his investigation. The court concludes that further discovery to attempt to discredit Greif and Rhoades would not advance the defendants' current allegations since it would not change the fact that the defendants forged Herndon's signature on a letter to Midland which requested more money than Herndon expected – the conduct for which the defendants were convicted. Therefore, the court concludes that this claim is also without merit.

**D. Violation of Fifth Amendment Right to Due Process Because Prosecution Presented Material Testimony Which It Knew or Should Have Known Was False**

For this claim, the defendants have outlined several different portions of testimony given by both Rhoades and Herndon which they claim that the government knew, or should have known, was false. The court will address these allegations of perjury individually.

In order to prove that the government suborned perjury, the defendants must show: "(1) that the witness actually lied in his testimony; (2) that the Government knew or should have known the testimony to be false; and (3) that there was a reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Neal*, 793 F. Supp. 1573, 1577 (W.D. Okla. 1991), *aff'd* 968 F.2d 22 (10th Cir. 1992). It is insufficient for a defendant to make bare allegations of perjury without supporting evidence. *See id.* at 1577-78.

The defendants first complain that the government knew, or should have known, that Rhoades perjured himself when he testified that he personally negotiated the agreement between Midland and the Sapps, was false. The court finds, upon review of the transcript of Rhoades' testimony, that this issue was raised by defense counsel on cross-examination and that Rhoades admitted that he was not a party to all negotiations for this agreement. Rhoades Tr. at 72-73. Thus, the court finds that this discrepancy was presented at trial, and the defendants cannot now complain of perjury.

The defendants next argue that the government knew, or should have known, that Rhoades perjured himself when he testified that Midland did not intend for the defendants to receive any cash from the $850,000 line of credit, was false. Upon review of the trial transcript, the court finds that this issue was also raised on cross-examination and that Rhoades admitted that the Sapps actually did receive $80,000 personally from the line of credit. Rhoades Tr. at 78. Again, the court finds that this issue was raised at the time of trial, and the defendants cannot now complain of perjury.

The defendants also complain that the government knew, or should have known, that Rhoades perjured himself when he testified that the $850,000 line of credit was the result of the defendants' application for a loan, was false. The court has extensively reviewed the transcript of Rhoades' testimony and does not find such a statement in his testimony. However, the court notes that Rhoades did admit that the agreement served several purposes, including settling the Sapps' lender liability claims. Rhoades Tr. at 72-74. Furthermore, the defendants have not cited to the portion of the transcript where Rhoades allegedly made this statement. Therefore, the court finds that this allegation has no merit.

The defendants next argue that the government knew, or should have known, that Rhoades perjured himself when he testified that the calculation of the $850,000 was keyed into the amount of debt the Sapps had at First State, was false. Upon review of Rhoades' testimony, the court finds that Rhoades admitted on cross-examination that approximately $380,000 from the line of credit went to pay creditors other than First State and that the Sapps

received approximately $80,000 from the line of credit. Rhoades Tr. at 78. Therefore, the court finds that this issue was presented at trial and that the defendants cannot now complain of perjury.

The defendants also argue that the government knew, or should have known, that Rhoades perjured himself when he testified that he would not have agreed to the $850,000 line of credit if he had known that First State would accept $280,000 to settle with the Sapps was false. The defendants assert that this statement was false because Midland entered into this agreement with the Sapps before the Sapps settled with First State. The court finds this argument to be unpersuasive. The statement does not imply that Rhoades knew the amount that it would take for First State to settle with the Sapps. The testimony was that, if he had known the amount that First state needed when Midland settled with the Sapps, he would not have allowed them to have access to such a large line of credit. Since Rhoades did not know, this was a hypothetical statement and the court does not find that this was perjury.

The defendants next assert that the government knew or should have known that Rhoades perjured himself when he testified that the $850,000 line of credit was calculated exclusively on the amount of outstanding loans at First State. This is essentially the same argument that defendants previously asserted, and the court found that this issue had been raised on cross-examination during the trial.

The defendants also argue that the government knew, or should have known, that Rhoades perjured himself

when he testified that Midland required a release, in the form of the forged letter, in order to have funds from the line of credit disbursed was false. Upon review of the transcript of Rhoades' testimony, the court found that Rhoades admitted on redirect examination that he would have given the Sapps money from the line of credit without any release or court order. Rhoades Tr. at 105-106. Therefore, the court finds that this issue was presented at the time of trial and that the defendants cannot now complain of perjury.

The defendants next allege that the government knew, or should have known, that Herndon perjured himself when he testified that he would not have discounted the defendants' loans by $279,000 if he had known that they were able to borrow $850,000 from Midland was false. This allegation is much like the hypothetical statement to which the defendants referred in Rhoades' testimony. The defendants have not offered the court any evidence that Herndon knew the amount that the Sapps would be able to obtain from Midland until some time after he had entered into the agreement with the Sapps. Therefore, the court concludes that this is a bare allegation of perjury which is not supported by the evidence.

Finally, the defendants allege that the government knew, or should have known, that Herndon perjured himself when he testified that the Sapps had inflated the amount of money which was requested in the forged letter was false. Upon reviewing Herndon's testimony, the court finds that Herndon did not perjure himself in making this statement. It is evident from his testimony that he understood First State's agreement with the Sapps

to include $280,000 from Midland and that the rest of the money needed to pay off or to bring the other loans current would come from some other source. Furthermore, the court notes that Herndon was cross-examined at some length on this topic by trial counsel. Herndon Cross-Examination Tr. at 47-61. Thus, this issue was also presented at trial, and the defendants cannot now complain of perjury. Therefore, the defendants have failed to establish a violation of their Fifth Amendment due process rights as a result of perjured testimony.

**E. Violation of Fifth Amendment Right to Due Process and to Indictment Only on a Finding of Probable Cause by a Grand Jury Because Government Pursued a Theory of Guilt on Count III Which Differed Substantially from the Indictment**

For this issue, the defendants claim that, because there was variance between the conduct which was alleged in the indictment and the theory of guilt and evidence produced at trial, the defendants were deprived of their due process rights.

"[Section] 2255 is not available to test the legality of matters which should have been raised on appeal." *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994). This procedural bar may be raised if it furthers " 'the interests of judicial efficiency, conservation of scarce judicial resources, and orderly and prompt administration of justice.' " *Id.* at 378-79 (quoting *Hines v. United States*, 971 F.2d 506, 509 (10th Cir. 1992)). Since the defendants did not raise this issue on direct appeal, they are barred from raising it now in their § 2255 motion. *United States v.*

*Barnes*, 43 F.3d 1484, 1994 WL 687369 at **1 (10th Cir. 1994).

**F. Motion for New Trial**

"A motion to grant a new trial 'is not regarded with favor and should be granted only with great caution, being addressed to the sound discretion of the trial court.' " *United States v. Stevens*, 978 F.2d 565, 570 (10th Cir. 1992) (quoting *United States v. Sutton*, 767 F.2d 726, 728 (10th Cir. 1985)). In order to prevail on a motion for a new trial based on newly discovered evidence, the defendants must establish that:

> (1) the evidence was discovered after trial; (2) the failure to learn of the evidence was not caused by [their] own lack of diligence; (3) the new evidence is not merely impeaching; (4) the new evidence is material to the principal issues involved; and (5) the new evidence is of such a nature that in a new trial it would probably produce an acquittal.

*Id.*

For this motion, the defendants maintain that they have ten different items of "newly discovered" evidence which should warrant a new trial. First, the defendants claim that Rhoades has now recanted his trial testimony in an affidavit which they submitted to the court. The court finds that this affidavit is consistent with Rhoades' testimony at trial, as discussed above. Therefore, it is not newly discovered evidence.

Defendants again assert the existence of an attorney-client relationship between Stinson, Mag & Fizzell, Greif,

and Midland. While the defendants now claim that they did not know of the existence of this relationship at trial, they already admitted that they knew about the relationship in their supporting memorandum for the § 2255 motion. For this reason, the court finds that this does not qualify as newly discovered evidence. Even if it were, it would not produce an acquittal for the reasons discussed above.

Defendants claim that the criminal referral filed by Herndon is also newly discovered evidence. The court has already addressed this allegation above and finds it to be without merit.

Defendants have also submitted an affidavit from one of the defendants' trial attorneys which states that the criminal referral is new and material evidence. As discussed above, the court finds this allegation to be without merit because Herndon was cross-examined about the referral at trial.

Defendants also claim that the interrogatories from Herndon that they submitted prove that Herndon's testimony at trial was false and that the indictment was flawed. The court finds nothing in these interrogatories that is inconsistent with Herndon's testimony at trial. Therefore, the court finds this allegation to be without merit.

Defendants also claim that the affidavits of Henry, McCallister, and Wirken are also newly discovered evidence which would warrant a new trial. The court finds that these potential witnesses were available and known at the time of trial; therefore, the affidavits of these three attorneys are not newly discovered evidence.

Defendants also claim that the affidavit submitted from Kevin Bachkora, an accountant for the defendants, outlines his responsibility and participation in determining proper disbursement of funds from the line of credit to creditors other than First State. The court notes, initially, that this affidavit merely states that Bachkora prepared a list of outstanding tax liens for the defendants while they were negotiating with Midland and the list of tax liens is attached to the affidavit. Again, this is not newly discovered evidence since this witness and list were known at trial. Furthermore, the court fails to see how this evidence would have made an acquittal more likely.

Finally, defendants claim that the evidence that Rhoades was banned from employment in the banking industry would warrant a new trial based on newly discovered evidence. While the court agrees that this is newly discovered evidence, the defendants have not shown that this evidence would be used for any purpose other than impeaching Rhoades. Nor have the defendants shown how this evidence would be material to the issues involved or how this evidence would produce an acquittal. Since they have not proven all five elements with regard to this claim, the defendants have not shown that a new trial is warranted. *See United States v. Neverdal*, 785 F. Supp. 123, 125 (D. Mont. 1990) ("Evidence that merely provides a different way to impeach the witness is not grounds for acquittal or a new trial when Defendant had the opportunity to impeach through cross-examination and other witnesses"). Therefore, the court finds that this motion must be denied.

### G. Other Pending Motions

Because of the result reached on the issues raised in the defendants' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 120) and the defendants' Motion for New Trial (Doc. 126), the court finds that it is not necessary to rule on the merits of the remaining motions submitted by the defendants. Therefore, those motions will be denied.

### H. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253(c) and Rule 22(b) of the Federal Rules of Appellate Procedure, no movant may appeal a district court's decision denying a 28 U.S.C. § 2255 motion without a certificate of appealability issued by a district judge or circuit judge. The certificate of appealability may issue only if the defendant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). In *Lennox v. Evans*, 87 F.3d 431, 433 (10th Cir. 1996), *overruled on other grounds by United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997), the Tenth Circuit Court of Appeals held that the standard established for the issuance of a certificate of appealability is the same as that governing the issuance of a certificate of probable cause as set forth in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), i.e., the defendant must make "a substantial showing of the denial of a federal right."

For the same reasons discussed above, the court finds that the defendants have not made "a substantial showing of the denial of a federal right." *Id.*

**IT IS THEREFORE BY THE COURT ORDERED** that the defendants' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 120) is denied.

**IT IS FURTHER ORDERED** that the defendants' Motion for New Trial (Doc. 126) is denied.

**IT IS FURTHER ORDERED** that the defendants' Motion to Authorize Discovery (Doc. 137), defendants' Motion to Expand the Record and for Other Appropriate Relief (Doc. 136), defendants' Motion for Evidentiary Hearing (Doc. 140), and defendants' Motion for Pre-Trial Conference (Doc. 143) are denied.

**IT IS FURTHER ORDERED** that the defendants are denied a certificate of appealability.

Dated this 8 day of December, 1997, at Topeka, Kansas.

/s/ DALE E. SAFFELS
DALE E. SAFFELS
United States District Judge

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>FLETCHER SAPP; RONALD SAPP,<br>Defendants-Appellants. | ) | No. 97-3384 |

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ORDER

Filed January 20, 1999

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Before **BRORBY, BRISCOE** and **LUCERO**, Circuit Judges.

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Appellants' petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court

PATRICK FISHER,
Clerk of Court

by: /s/ Illegible
Deputy Clerk

---

## AFFIDAVIT

STATE OF MISSOURI )
) ss.
COUNTY OF JACKSON )

I, James Wirken, of lawful age, being first duly sworn, state as follows:

1. I am a lawyer who, at all pertinent times, was employed by the Kansas City, Missouri law firm of Wirken & King, P.C., a firm which is now known as King, Hershey, Koch and Stone. I am now a lawyer with The Wirken Group, P.C.

2. I practice law in both Missouri and Kansas. I am admitted to practice in the State of Missouri.

3. My prior law firm and I, along with Brian McCallister of the same firm, represented Fletcher Sapp and Ronald Sapp (the "Sapps ") during negotiations with Midland Bank of Kansas in 1990 and 1991. The Sapps had loans with several banks and savings and loans, many of which had common ownership through entities controlled and/or owned by Kansas City banker, Lee Greif We negotiated on behalf of the Sapps with Midland Bank of Kansas to settle lender liability litigation threatened by the Sapps against the Lee Greif controlled banks.

4. On at least three separate occasions, Lee Greif conditioned the making of legitimate loans to the Sapps upon the purchase of properties on which the bank held other bad loans. The Sapps, in order to get loans for their on-going businesses, had to make another loan and take title to real property that was over-loaned to its actual

value. This is a violation of the anti-tying act, 12 U.S.C.A. § 1972, and constitutes lender liability, and the bank and Greif had significant liability exposure for the damages they caused the Sapps. If successful, the Sapps' claims against Midland bank of Kansas would have resulted in a judgment for actual damages, certain incidental damages, plus attorneys' fees. This would have been an outright award and arguably the Sapps would not have been obligated to repay any of the loans.

5. These over-loaned to value properties immediately became problems for the Sapps, causing them to put their own personal and business money into such properties for repairs and to service the debt.

6. The Sapps advised us that their businesses and they personally began having major cash flow problems with their creditors as a result of these unlawful loans, and they retained our firm for the intended purpose of suing Lee Greif and Midland Bank of Kansas for their substantial lender liability claims involving violation of the anti-tying act, at 12 U.S.C.A. § 1972.

7. Upon notification of potential liability, Greif and Midland Bank of Kansas retained Attorney Chris Henry of McDowell, Rice and Smith to represent them.

8. Through counsel, a negotiation was concluded favorably for both the Sapps and Midland Bank of Kansas with the execution of a consolidated Loan Agreement, which served to settle and release the claims of the Sapps against Lee Greif and his controlled banks. This Loan Agreement was signed on February 7, 1991.

9. To meet one of the critical requirements for the Sapps' release of their claims against Greif and Midland Bank of Kansas, the Loan Agreement offered and made available $850,000.00 to the Sapps to "settle pending litigation" against them by their creditors, as well as to resolve their "indebtedness at First State Bank", another Kansas bank with which the Sapps did banking business. During the negotiations, it was never represented that the entire $850,000.00 was needed to settle the Sapps' indebtedness at First State Bank. The Loan Agreement made very clear that the $850,000.00 was to be used for several items.

10. The Loan Agreement on Page 12, Art. IV.C. provides:

> "Disbursements pursuant to Art. III.A.7.b shall be subject to approval by Bank (Midland Bank of Kansas) and the submission by Borrowers of appropriate court orders or releases indicating satisfaction of borrowers debts to their creditors. The surplus shall be disbursed to Borrowers."

11. The "surplus" provision of the Loan Agreement was of vital importance for the release of the Sapps' threatened claims of lender liability against the Lee Grief controlled banks.

12. The intent of the February 7, 1991 Agreement with respect to the $850,000.00 was that it was to be under control of the Sapps. Midland Bank's function was to fund the Sapps' requests for payment to creditors, and disburse the balance to the Sapps when requested. All parties understood this, and without this understanding, the Sapps would not have released their lender liability claims. (See Exhibit A, Chris Henry's Affidavit).

13. Bruce Rhoades did not negotiate the Loan Agreement. The Loan Agreement was negotiated by myself, Brian McCallister, the Sapps, Lee Greif, and Chris Henry, Midland Bank of Kansas' legal counsel.

14. On March 15, 1991, I was contacted by the Sapps as it related to their signing, without authorization, of the name of David Herndon, President of First State Bank, to a letter dated February 27, 1991, directing Midland Bank of Kansas to disburse approximately $405,000.00 to First State Bank from the $850,000.00 "made available" to the Sapps in the February 7, 1991 Loan Agreement. This disbursal from the Sapps' "available" $850,000.00 was to aid in the funding of a workout agreement between the Sapps and First State Bank relating to their indebtedness at that bank, and was memorialized on February 28, 1991, the terms of which were known to the Sapps prior to the final signing of the document.

15. On March 15, 1991, through a simultaneous speaker phone conversation and with the Sapps, in my office, I contacted David Herndon and attorney John Peterson, of the law firm of Williamson and Cubbison of Kansas City, Kansas, who was known to be First State Bank's attorney. During that conversation, I was informed by Mr. Peterson and Mr. Herndon that, albeit not happy about the unauthorized making of Herndon's signature by the Sapps on the February 27, 1991 letter, the letter was immaterial to them and that they only wanted their money. Peterson and Herndon confirmed this by letter on March 18, 1991 (Exhibit B), and subsequently on March 22, 1991, they voluntarily completed the workout agreement, even though it had expired by its own terms on March 1, 1991 (Exhibit C).

16. At no time did Mr. Herndon or Mr. Peterson ever express to me or discuss the fact that they considered the numbers in the February 27, 1991 letter to be inflated, nor did they express to me or discuss the fact that they felt the Sapps were attempting to defraud Midland Bank by asking for $125,000.00 more than they owed pursuant to the February 28, 1991 Agreement.

17. At no time did Mr. Herndon or Mr. Peterson ever express to me or discuss anything pertaining to the repayment of anyone's certificates of deposit pledged at First State Bank as collateral on some of the Sapps' loans.

18. At no time did Mr. Herndon or Mr. Peterson ever express to me or discuss anything concerning the correctness or incorrectness of the terms in the February 27, 1991 letter, except as to the signature.

19. I know that the Sapps owed First State Bank substantially more than $405,000.00 and that it took significantly more than $405,000.00 cash from the Sapps to fund the workout agreement by the imposed deadline of March 1, 1991. It was not outside, in fact it was specifically contemplated in the February 7, 1991 Settlement/Loan Agreement between the Sapps and Midland Bank, for the Sapps to request a disbursal for the funds they felt necessary to pay First State Bank. Albeit they may have signed Mr. Herndon's name to the request for disbursal, the Sapps were entitled to at least $850,000.00 from Midland Bank of Kansas, and therefore were clearly entitled to $405,000.00, which in fact was subsequently paid to First State Bank in the global closing on all related transactions. If Midland Bank had refused to disburse the money as requested by the Sapps, Ron and Fletcher Sapp

would have a legitimate cause of action against Midland Bank of Kansas for breach of the February 7, 1991 Agreement. In fact, the Sapps threatened to sue Midland Bank of Kansas for not disbursing the money as requested in the February 27, 1991 letter. However, the Sapps released their additional claims on April 12, 1991 when Midland Bank of Kansas finally complied with its duty under the February 7, 1991 Agreement and disbursed the balance of the $850,000.00 loan, including $80,000.00 to the Sapps for their personal use.

20. In July of 1996, I obtained from the Sapps a document that they obtained through discovery in a civil lawsuit by the Sapps against First State Bank and Mr. Herndon. The document was a copy of a Report of Apparent Crime submitted to the FDIC, FBI and the U. S Attorney General's Office by Mr. Herndon and First State Bank on March 25, 1991 (Exhibit C) This document was apparently filed after the entire transaction was completed and the Sapps had paid First State Bank who had voluntarily bound themselves to and benefitted from the expired agreement. David Herndon and First State Bank claimed that the Sapps had criminally inflated the payoff balances of the workout agreement from $280,000.00 to $405,000.00 in their request for payment submitted to Midland Bank, in an attempt to fraudulently obtain $125,000.00 from Midland Bank. The Government withheld this document containing Mr. Herndon's statement from the Sapps prior to trial, and the Sapps obtained it for the first time from First State Bank in July of 1996 (Exhibit D).

21. The Report of Apparent Crime was false because the payoff balances negotiated by my office were

much higher than $405,000.00. The cash required from the Sapps to fund the February 28, 1991 workout agreement was higher than $405,000.00. To the best of my knowledge, First State Bank did not know what rights the Sapps had under the February 7, 1991 Agreement with Midland Bank. If loans at First State Bank had been secured by CDs, the Sapps could have paid those loans from their $850,000.00 available under the February 7, 1991 Agreement or surrendered their CDs, at their option.

22. The Sapps had no obligation to submit the details of their workout agreement with First State Bank to Midland Bank of Kansas, who was not involved in or a party to the workout agreement between the Sapps and First State Bank, and Midland Bank of Kansas' only responsibility was to find the payment request from the Sapps. (See Exhibit A).

23. David Herndon, First State Bank, and John Peterson were not involved in my negotiations with Midland Bank of Kansas, and were not privy to the terms, conditions or intent of the February 7, 1991 Loan Agreement, to the best of my knowledge.

24. I was available to testify at the Sapps' criminal trial, and I am aware of many demands by the Sapps to have their criminal attorneys call me and/or Brian McCallister as witnesses. In fact, the only reason I did not represent the Sapps on the federal indictment was that I expected to be a material witness in the case. I find it mind-boggling that the Sapps' defense attorneys never called me to testify. I was also never contacted by the FBI or the U.S. Attorney's Office.

25. If I had been given the opportunity to testify, I could have put the entire transaction in context. The Sapps may have inappropriately signed Mr. Herndon's name to the February 21 letter. The substance of the letter is well within the terms of the Sapps' agreement and is not misleading, deceitful or materially false with respect to either bank. In fact, that is why I immediately called Bruce Rhoades and discussed the false signature. The amount of money was correct, the money was eventually paid by Midland to First State Bank to apply to the Sapp's indebtedness. In fact, both banks benefitted from the deal. I do not believe anyone relied on any false signature. I do not believe that anyone had any intent to defraud anyone. In fact, no one lost a dime, no one was defrauded and in fact, First State Bank and Midland clearly were benefitted.

27. I was involved in the negotiation and completion of the settlement transaction that was completed on February 7, 1991 between Midland Bank and the Sapps. At no time did the Sapps provide false or misleading information to Midland Bank.

28. Midland Bank and Lee Greif, however, breached the agreement, and damaged the Sapps on April 10, 1991. To obtain the Sapps' release of their claims, Midland Bank also agreed to allow the Sapps to deed back to the bank the properties they had been wrongfully required to buy. These properties were the subject of Loan Number 4 of the February 7, 1991 Loan Agreement. The Sapps were to deed these properties back on April 12, 1991, and have no further obligations regarding them. However the Bank, on April 10, 1991, illegally and without the Sapps' authorization disbursed $620,000.00 from Loan Number 1, a

$2,000,000.00 loan, which included the $850,000.00, and illegally applied it to Loan Number 4. The Sapps sued and obtained a judgment against Lee Greif for these wrongful acts. (Exhibit E).

29. I am a lawyer who since 1986 has specialized in lender liability transactions of this nature, and I am aware of no federal or state law that requires individuals to disclose their borrowing capacity at other lending institutions when negotiating a discount for an early payoff of loans. Banks discount loans for many reasons, including changes or anticipated changes in interest rates, changes in a borrower's or guaranator's financial situation, the condition of collateral or other advantages the banks would accrue for an early payoff. A copy of my biography concerning lender liability is attached as Exhibit F.

30. Being familiar with this transaction, I am concerned about the appropriateness of the order that the Sapps pay "restitution" to First State Bank of $279,000.00. This discount was negotiated in good faith in exchange for the Sapps' payment of a substantial amount of cash to First State Bank. I think the restitution order is an unfair burden on the Sapps and unjust enrichment to First State Bank.

FURTHER AFFIANT SAITH NAUGHT.

/s/ James C. Wirken
James C Wirken

Subscribed and sworn to before me this 16th day of July, 1997.

/s/ Erin C. Thompson
Notary Public

My Commission Expires:
3-22-99

ERIN C. THOMPSON
Notary Public-Notary Seal
STATE OF MISSOURI
JACKSON COUNTY
My Commission Expires Mar 22, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff

v. Case No. 94-3077
FLETCHER SAPP AND 94-3078
RONALD SAPP 94-3079
Defendants

## AFFIDAVIT

COMES NOW Bruce Rhoades, herein referred to as "Affiant", of lawful age, first being duly sworn, does state as follows:

1. During the time frame of January, 1991 through April, 1991, Affiant was the President of Midland Bank of Kansas ("MBOK") . This bank, during the aforementioned time frame, was the named victim of an alleged bank fraud count in an Indictment returned in the United States District Court of the District of Kansas captioned United States of America v. Fletcher Sapp and Ronald Sapp, Case No. 93-20064-01.

2. On February 7, 1991, the Sapps entered into a loan agreement with MBOK. (See attached Exhibit 1). Among other provisions, the Loan Agreement provided that $850,000.00 would be available to the Sapps. On November 30, 1993, Affiant testified on behalf of the United States in its prosecution against the Sapps. Affiant expressed an opinion based upon Affiant's general impression and belief that this $850,000.00 was substantially for the purpose of satisfying the Sapps indebtedness to First State Bank.

3. The February 7, 1991 Loan Agreement (See Exhibit 1) provides them on page 7, Article III, 7.b, as follows:

> Disbursement of loan proceeds: $850,000.00 to be made available to Fletcher and Ron to settle pending litigation and their indebtedness at First State Bank.

4. Affiant was not a party to the negotiation or the drafting of the February 7, 1991 Loan Agreement. This negotiation and drafting of this Loan Agreement, upon information and belief, was conducted by the Sapps, their attorneys, Jim Wirken and Brian McCallister, MBOK Chairman, Lee Greif, and MBOK's attorney, Chris W. Henry.

5. Affiant has seen and reviewed the Affidavit of Chris W. Henry dated March 1, 1994, which was admitted into evidence at appellants' sentencing hearing, (see Exhibit 2 attached), detailing his knowledge and information concerning the meaning and intent of the February 7, 1991 Loan Agreement. Affiant has no knowledge or information contrary to the first hand account of the concerns and intent surrounding the preparation of the February 7, 1991 Loan Agreement as stated by Chris W. Henry in his Affidavit.

6. It was Affiant's understanding that the loan that is the subject matter of this Indictment was not a construction loan, the entire $850,000.00 was to be disbursed. A portion of the $850,000.00 was intended to be disbursed to the Sapps pursuant to the Loan Agreement on page 12,

Article IV, C., as follows: "The surplus shall be disbursed to borrowers."

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Bruce Rhoades
BRUCE RHOADES

SUBSCRIBED AND SWORN to before me this 17 day of August, 1994.

/s/ Marta Ross
Notary Public

My Commission Expires:

1-6-97

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | CRIMINAL ACTION |
| v. | ) | Case No. 93-20064-01 |
| FLETCHER SAPP, Defendant. | ) | |

AFFIDAVIT

I, Brian F. McCallister, of lawful age, being first duly sworn, state as follows:

1. I am a lawyer who, at all pertinent times, was employed by the Kansas City, Missouri law firm of Wirken & King, P.C., a firm with which I no longer practice. I am now a lawyer with The Wirken Group, P.C.

2. I practice law in both Missouri and Kansas.

3. I represented Fletcher Sapp and Ronald Sapp during negotiations with Midland Bank of Kansas. Fletcher Sapp and Ronald Sapp had loans with several banks, many of which had common ownership through entities controlled and/or owned by Kansas City banker, Lee Greif. I negotiated on behalf of Fletcher Sapp and Ronald Sapp with Midland Bank of Kansas to settle lender liability litigation threatened by Fletcher Sapp and Ronald Sapp against the Lee Greif – controlled banks. The negotiations concluded favorably for Fletcher Sapp and Ronald Sapp with the execution of a consolidated Loan Agreement which, in part, released the claims of Fletcher

Sapp and Ronald Sapp against the Lee Greif – controlled banks.

4. Among other provisions of the Loan Agreement, Midland Bank of Kansas offered and made available $850,000.00 to Fletcher Sapp and Ronald Sapp to discharge certain claims against them by their creditors, as well as to resolve their indebtedness with First State Bank, another Kansas bank with which Fletcher Sapp and Ronald Sapp did banking business. During negotiations, Fletcher Sapp and Ronald Sapp never represented that the entire $850,000.00 was needed to settle their indebtedness at First State Bank. The Loan Agreement makes very clear that the $850,000.00 was to be used for several items, including making certain funds available for use by FHP for personal use and needs, indicated below.

5. The Loan Agreement, Art. IV.C. provides "Disbursements pursuant to Art. III.A.7.b shall be subject to approval by Bank [Midland Bank of Kansas] and the submission by Borrowers' of appropriate court orders or releases indicating satisfaction of borrowers debts to their creditors. The surplus shall be disbursed to Borrowers." The "surplus" provision of the Loan Agreement was of vital importance for the release of Fletcher Sapp's and Ronald Sapp's threatened claims of lender liability against the Lee Greif – controlled banks.

6. Bruce Rhodes, while peripherally involved in Fletcher Sapp's and Ronald Sapp's banking business with the Lee Greif – controlled banks, did not negotiate the Loan Agreement. The Loan Agreement was negotiated by

myself, Fletcher Sapp, Ronald Sapp, Lee Greif and Chris Henry, Midland Bank of Kansas' legal counsel.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Brian F. McCallister
BRIAN F. MCCALLISTER

Sworn to and subscribed to before me this 10th day of August, 1994.

/s/ Virginia Renee Mora
Notary Public

My Commission Expires:

VIRGINIA RENEE MORA
Notary Public – Notary Seal
STATE OF MISSOURI
Jackson County
My Commission Expires April 4, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA

Plaintiff,

v. Case No. 93-20064-01

FLETCHER SAPP AND
RONALD SAPP

AFFIDAVIT

COMES NOW Chris W. Henry, herein "Affiant", of lawful age, first being duly sworn, who deposes and states as follows:

1. At all times pertinent hereto Affiant was a licensed practicing attorney and a partner in the law firm of McDowell, Rice and Smith.

2. Affiant was the attorney for Midland Bank of Kansas ("MBOK") and was the draftsman of the Loan Agreement entered into between MBOK and Ron and Fletcher Sapp (herein "the Sapps") on Feb. 7, 1991.

3. The February 7 Loan Agreement served in part to resolve certain claims that the Sapps had threatened against MBOK. It also restructured the Sapps' loans at MBOK. Among other provisions, the Loan Agreement provided that $850,000 could be used to discharge some of the claims against the Sapps, including those by First State Bank ("FSB"). It was never contemplated that the entire $850,000 would be available for FSB (see the Loan Agreement Art.III,A. 7 .b.). Other claims, including those

of the Internal Revenue Service, were thought to be important by MBOK.

4. The Agreement, Art. IV.C provided: "Disbursements pursuant to Art. III.A.7.b. shall be subject to approval by Bank (MBOK) and the submission by Borrowers' of appropriate court orders or releases indicating satisfaction of borrowers debts to their creditors. The surplus shall be disbursed to Borrowers." It was contemplated by the parties to the Loan Agreement that the "release" language as pertains to the Sapps debt at FSB would be satisfied by copies of the notes marked "Paid" from FSB, in the normal course of business, after receipt by FSB of wired funds from MBOK.

5. MBOK was not a party to or participant in the Sapps negotiations with their many creditors. Under the terms of the Feb. 7 1991 Loan Agreement, once MBOK fulfilled all of the Sapps requests for payments, the balance, if any, of the $850,000 was to be disbursed to the Sapps to use at their discretion.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Chris W. Henry
CHRIS W. HENRY

Sworn to and subscribed to before me this 1st day of March 1994.

/s/ Romi Roemer
Notary Public

My Commission Expires:

ROMI ROEMER NOTARY PUBLIC STATE OF KANSAS
My Appt. Exp. 9-1-96

STINSON, MAG & FIZZELL
A PROFESSIONAL CORPORATION

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WRITER'S DIRECT DIAL
(816) 691-[ ]

August 31, 1993

James R. Wyrsch, Esq.
Wyrsch Atwell Mirakian Lee & Hobbs, P.C.
10th Floor, 1006 Grand Building
1006 Grand Avenue
Kansas City, Missouri 64106

Re: Stinson, Mag representation of
Fletcher Sapp and Ronald Sapp

Dear Jim:

Fletcher Sapp and Ronald Sapp have asked that Stinson, Mag & Fizzell represent them with regard to matters arising out of an indictment which has been returned in the District of Kansas. Because the indictment alleges events related to the Sapps' relationship with Midland Banks, we are asking that you and Mr. Lee Greif waive any actual or potential conflicts of interest that may arise out of our representation of the Sapps.

Wyrsch Atwell hired Michael Lochmann, a partner at Stinson, Mag, to assist them in their representation of Lee Greif by providing an analysis of and advice on the banking laws. In the course of that employment, Mr. Lochmann met with members of the Wyrsch firm and also with Mr. Greif. Mr. Lochmann states that during that employment he did not receive any information relating to the dealings of Midland Bank or Lee Greif with the Sapps or any of the companies owned by them. Mr. Lochmann further states that no confidential information that he obtained from Wyrsch Atwell or Mr. Greif will be used for the benefit of the Sapps.

By signing this letter and returning it to me, you, on behalf of Wyrsch Atwell, and Mr. Greif acknowledge that you have been advised that Stinson, Mag & Fizzell will be representing the Sapps and that after full consultation, Wyrsch Atwell and Mr. Greif waive any actual and potential conflicts of interest by Stinson, Mag arising out of Mr. Lochmann's prior work for Wyrsch Atwell on Mr. Greif's behalf and Stinson, Mag's subsequent representation of the Sapps. It is understood that this waiver includes the full range of representation of the Sapps, including not only the preparation and trial of the matter but possible negotiations with the government of the United States in which the Sapps might provide information or assistance to the government that could be adverse to Mr. Greif. By signing this letter, Wyrsch Atwell and Mr. Greif agree that neither will assert that Stinson, Mag & Fizzell has any actual or potential conflict of interest arising out of its representation of the Sapps because of its earlier work for Wyrsch Atwell on behalf of Mr. Greif.

Sincerely,

/s/ David E. Everson

David E. Everson

DEE:ck

Accepted and agreed to this 12th day of October, 1993. Provided that nothing herein shall constitute a waiver of Mr. Greif's attorney-client or other privileges or work product, which shall continue to be preserved.

/s/ Lee Greif
Lee Greif

/s/ James R. Wyrsch
James R. Wyrsch

For Wyrsch Atwell Mirakian Lee
& Hobbs, P.C.

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

| | | |
|---|---|---|
| FLETCHER D. and RUTH SAPP, | ) | |
| Plaintiffs, | ) | Case No.: 94C 4066 |
| | ) | Court No.: |
| v. | ) | K.S.A. Chapter 60 |
| LEOPOLD H. GREIF, a/k/a LEE GREIF | ) | |
| Defendant. | ) | |

JOURNAL ENTRY OF JUDGMENT

Now on this 23 day of October, 1995, there came on for trial the captioned matter. Plaintiffs appear in person and by their attorneys Michael L. Hodges and Michael Lawless. Defendant fails to appear.

Thereafter, plaintiff waived his right to jury trial and presented evidence to the Court. The plaintiff then rested.

Thereafter, the Court made findings and rulings as follows:

1. That defendant Lee Greif caused plaintiffs to be damaged by his breach of duty, neglect, negligent misstatements, and negligence.

2. That defendant Lee Greif was unjustly enriched by his wrongful acts and the wrongful acts of bank employees.

3. that plaintiffs were damaged in the amount of $620,650.59 and that the damage occurred on April 10, 1991.

4. That a reasonable interest rate reflecting a return on investment at that time was 9% per annum.

Therefore, judgement is entered in favor of the plaintiffs against the defendant Lee Greif in the amount of $914,564.14 which represents the damages of $620,650.59 plus interest of 9% to date. Costs of this action are assessed against the defendant.

IT IS SO ORDERED.

/s/ Gerald T. Elliott
The Honorable Judge
Gerald T. Elliott

Approved by:

/s/ Michael L. Hodges
MICHAEL L. HODGES, #09860
6950 Squibb Road, Suite 400
Mission, Kansas 66202
(913) 831-4444
ATTORNEY FOR PLAINTIFFS